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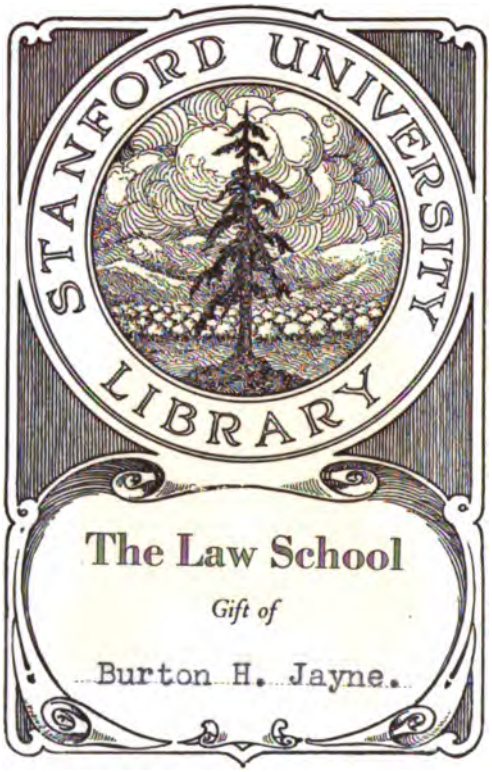

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# CASES

ON

# THE LAW OF CARRIERS

SELECTED FROM DECISIONS OF

## ENGLISH AND AMERICAN COURTS

BY

FREDERICK GREEN

PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

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# THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

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It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,
General Editor.

THE translations of passages from medieval sea laws, printed in this collection, are taken from the work published by Sir Travers Twiss under the title of The Black Book of the Admiralty, Monumenta Juridica, London, Longman & Co., etc. The editor is indebted to Joseph H. Iglehart, Esq., of the Indiana bar for the selection of some of the cases in Part V.

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# CASES ON THE LAW OF CARRIERS

# PART I

## INTRODUCTORY TOPICS

### CHAPTER I

### THE LIABILITY OF A BAILEE FOR DAMAGE TO THE ARTICLE BAILED

#### YOUNG v. LEARY.

(Court of Appeals of New York, 1892. 135 N. Y. 569, 32 N. E. 607.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 5, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was an action upon a guaranty. The facts so far as material are stated in the opinion.

PECKHAM, J.[1] The questions in this case arise out of a charter party[2] executed on the 17th of October, 1884, by the Washburn Steamboat Company and one McKay, for whom the defendant became surety. The company on the day mentioned let, and McKay hired, the steam propeller called the Alicia A. Washburn, of which the company was the owner, for the term of 12 months from October 17, 1884, to be employed in lawful trade between Key West and other points on the West Florida coast, on the terms and conditions mentioned in the char-

[1] Parts of the opinion are omitted.

[2] "Charter party (charta partita; i. e., a deed of writing divided) is all one in the civil law with an indenture at the common law." Molloy, De Jure Maritimo, book II, c. 4, § 4.

ter party. Among other provisions thereof was one by which McKay agreed * * * that on the termination of the charter he would "deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor, in the same good condition as she is now in, ordinary wear and tear excepted." * * * The vessel was burned at sea in January, 1886. * * *

The remaining obligation of McKay under this charter party is contained in that provision by which he agreed, in the language already quoted, to deliver the vessel to the company in New York harbor.

It has been claimed on the part of the plaintiff in the courts below, and it is now urged here, that this promise to deliver was on its face an absolute and unconditional one, and a failure to fulfill it would not be excused by the entire destruction of the vessel before breach, and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute, and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired, before breach, and without the fault of him who hired it, would not absolve the latter from his contract. If it would, there is the further question whether the facts herein do not show a waiver of the contract to deliver at the specified date, and an implied extension of the time for such delivery, and the destruction of the vessel within the time thus extended, without the fault of the hirer; or, at least, whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

The case of Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142, is one of the leading cases of that class which must have controlled the judgment of the courts below in the case at bar. It was there reiterated, as a principle well founded in the law of contracts, that inevitable accident or any unforeseen contingency, not within the control of the party promising, was no defense to an action founded upon the express promise to do the thing and a failure of performance. An act of God, it was said, would excuse a party from performing a duty created by law, but not where such party had unconditionally engaged by express contract to perform. It is argued that here is an express promise to deliver this vessel in the harbor of New York, and, as the promise was not fulfilled, the promisor is liable, and hence the liability of the defendant as his surety. We do not think that the law applicable to the class of cases of which that of Harmony v. Bingham, supra, is a conspicuous example, applies here.

The contract in this case comes, as it seems to us, under another class, which relates to the hiring for use of the thing hired, and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such cases of express contract, there is implied a condition of the continued existence of the

thing which is the subject of the contract; and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused. If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused. Williams v. Lloyd, W. Jones, 179; Sparrow v. Sowgate, Id. 29.

Mr. S. Martin Leake, in his Digest of the Law of Contracts (at page 706), says: "The authorities establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible from the perishing of the thing without the default of the contractor."

Several cases are referred to in support of this proposition. Among them are those in the note to Hall v. Wright, 96 E. C. L. 745, at side of page 747, El. Bl. & El. 746; Taylor v. Caldwell, 3 Best & S. 826, 113 E. C. L. 826. Blackburn, J., says, in last case, that the implication in an express contract of this nature, that the thing itself shall be in existence when the person is called upon to fulfill his contract, tends to further the great object of making the legal construction such as to fulfill the intention of the parties to the contract; for in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. See, also, Appleby v. Myers, L. R. 2 C. P. 651, per Blackburn, J., 658.

There is no question that a party can, if he so please, bind himself to deliver notwithstanding the thing may perish which he contracts to deliver. He does not thus bind himself by the use of the ordinary language as contained in this charter party. The above cases show this to be true.

When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.

So it was held in the case of Ames v. Belden, 17 Barb. 513, where the defendant was sued for its value for not returning a steamboat according to the condition of the charter party by which defendant agreed to return the same at the expiration of the term in as good condition

as it then was, excepting ordinary use and wear. The court said the language must be held to have reference to the ordinary obligation of such a bailee to return the article hired, and defendant was exempt if before the time arrived the article had been destroyed without his fault. This is only another way of saying that an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and, if in the mean time it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed. The case is thus entirely supported by the cases above cited. To the same effect is the case of Hyland v. Paul, 33 Barb. 241.

The same principle has been held operative in covenants or agreements contained in leases of real estate which included buildings, and where the lessee has agreed to deliver possession of the same at the expiration of the lease in the same condition as at the date of the lease, natural wear and tear excepted. This obligation is subject to the implied condition that the building shall be in existence at the end of the term, and, if before that time it was burned down without the default of the tenant, he is held not liable under his contract. Warner v. Hitchins, 5 Barb. 666; McIntosh v. Lown, 49 Barb. 550, at 555; 1 Wood, Landl. & Ten. (2d Ed.) 811, 813, notes; 1 Tayl. Landl. & Ten. (8th Ed.) § 360, latter part of section. It is otherwise if the lessee has covenanted to repair or rebuild. McIntosh v. Lown, supra; Phillips v. Stevens, 16 Mass. 238.

It seems to me as if authorities are not required upon the proposition that, in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made; for, to again quote the language used by Mr. Justice Blackburn in Taylor v. Caldwell, supra: "In the course of affairs, men in making such contracts in general would, if it were brought to their minds, say that such should be the condition." There is nothing in the other portions of the charter party which affects in any way, to the detriment of the defendant, this particular question. * * *

No question arises in this record as to where lies the burden of proof as to the loss of the vessel and its cause.[3] The case was tried and decided upon a different theory, and without reference to the question of burden of proof. It is not, therefore, necessary to now discuss it. For the reasons already given, the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.

Judgment reversed.

[3] As to the burden of proof, see Lamb v. Camden Co., post, p. 440; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467 (1878); Knights v. Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375 (1896); 3 Am. & Eng. Ency. of Law (2d Ed.) 750.

## POPE v. FARMERS' UNION & MILLING CO.

(Supreme Court of California, 1900. 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87.)

Appeal from a judgment of the superior court of San Joaquin county and from an order denying a new trial.

HENSHAW, J. Plaintiff sued to recover from defendant the value of certain wheat deposited under the terms of the following written contract: "Stockton, Cal., July 31, 1897. Received of Mrs. L. C. Pope, in the Eureka warehouse, situated on Levee street, Stockton, the following described merchandise, which we agree to deliver (damage by the elements excepted), upon the surrender of this certificate and payment of charges, twenty-seven hundred seventy-six sacks wheat, weighing three hundred eighty-three thousand one hundred forty-six pounds. Rates of storage, seventy-five cents per ton for the season ending June 1, 1898. 2,776 sacks wheat, weighing 383,146. Room 6, pile No. 67. Mark: 'L. C. P.'"

The complaint alleged a demand upon the defendant for the return of the wheat, and its failure to comply therewith. The answer of defendant did not deny the existence of the contract, but pleaded that, through no negligence upon its part, the major portion of the wheat was destroyed by fire, and the rest of it so badly damaged as to be of small value, and offered to restore to plaintiff the damaged wheat in its possession, and the value of such portion of the damaged wheat as it had already sold. Under these pleadings, a trial was had before a jury. The plaintiff rested her case without the introduction of any evidence. The evidence for the defense, which was admitted without any objection by plaintiff, showed that the warehouse was destroyed by fire, and that the fire was of incendiary origin. The court instructed the jury, generally, that plaintiff could not recover if it were not shown that defendant was negligent. Verdict passed for defendant, judgment in its favor followed the verdict, and from that judgment, and from an order denying her a new trial, plaintiff appeals.

By its written contract, defendant promised absolutely to return the wheat to plaintiff upon surrender of the certificate, "damage by the elements excepted." "Damage by the elements" is the equivalent of the phrase "act of God." Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Chidester v. Ditch Co., 59 Cal. 202; Fay v. Improvement Co., 93 Cal. 253, 261, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation, namely, that defendant's liability to return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract, it was no defense for defendant to say, or to show, that the wheat was destroyed without negli-

gence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tended merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God. The judgment and order are therefore reversed, and the cause remanded.

TEMPLE and MCFARLAND, JJ., concurred.

Hearing in bank denied.

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## JAMINET v. AMERICAN STORAGE & MOVING CO.

**(St. Louis Court of Appeals, 1904. 109 Mo. App. 257, 84 S. W. 128.)**

GOODE, J.[4] Action against defendant for the destruction of a mirror and the partial destruction of a portrait of the plaintiff while the defendant was moving the plaintiff's household goods from a residence on Laclede avenue, in the city of St. Louis, to one on Cates avenue. * * * For the plaintiff the court instructed the jury that if they found the defendant's agent agreed with the plaintiff well and safely to move and carry her household furniture and goods between the respective residences, and deliver them in as good condition as when received, and that a painting and a mirror, or either of them, were injured or destroyed while in the defendant's possession, the verdict should be for the plaintiff. The court refused instructions requested by the defendant of the following purport: * * * That the defendant was charged with only reasonable care in handling the portrait—that is, such care as prudent men use in carrying on their business—and, if defendant's servants handled it with that degree of care, the defendant was not responsible. * * *

The important inquiry is as to the extent of the appellant's undertaking, and the legal duty incumbent on it in consequence thereof. What did the appellant agree to do? There is a principle of law which may be stated in general terms as follows: When a party, by an absolute agreement, imposes the duty on himself of performing an act, he is not relieved of liability on his obligation by a subsequent event which renders performance impossible. Davis' Adm'r v. Smith, 15 Mo. 467; Harrison v. R. R., 74 Mo. 364, 41 Am. Rep. 318; Beatie v. Coal Co., 56 Mo. App. 230. * * *

But is the rule mentioned the proper test of the appellant's liability? Liability on its part as a common carrier was excluded. It stands, therefore, as a private carrier (locatio mercium vehendarum) or bailee for hire, subject only to the duties and responsibilities of such a bailee, unless by agreement it assumed additional ones. Now, what are the usual duties and obligations of such a bailee? To give the care, skill, and diligence to the effort to safely carry and redeliver the bailed

[4] Parts of the opinion are omitted.

property to the bailor that are commonly given by men in the same employment. Such a carrier, like other bailees for hire, is only responsible for losses occasioned either by his own or his servants' negligence. Story, Bailments (9th Ed.) art. 4, § 457; Hutchinson, Carriers (2d Ed.) 37; United States v. Power, 6 Mont. 271, 12 Pac. 639; White v. Bascom, 28 Vt. 268; Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435.

It follows from the above doctrine and authorities that the appellant was not bound at all events to deliver the respondent's goods, including the portrait, in an undamaged state, at her new home, by force of its general obligation as a private carrier for hire; and could have become thus bound only by a special term in the contract between the parties, by some definite stipulation or warranty superadding to the ordinary duty and responsibility of a private carrier a responsibility akin to that resting on a common carrier. Prima facie, the appellant was liable, as the portrait was bailed to it in good condition and was returned damaged. But the proof is that the damage happened without the fault of appellant's servants, and in a way that no man could have foreseen or prevented. That makes a good excuse for a bailee not bound by a special undertaking. Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Mills v. Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

But it is contended the appellant stipulated specially for the safe carriage and redelivery of respondent's property in as good condition as when received by it. As to the latter words ("as good condition as when received by it"), we find no testimony that they or their equivalent were uttered by the parties when negotiating the contract, and in leaving the jury to find there was a contract containing them the instruction to the jury went beyond the evidence. The most that was testified to against the appellant was that its manager agreed to move and deliver the goods safely, and to be responsible for them. * * *

Can it fairly be said, on any aspect of the evidence, that appellant contracted against injury by the malicious act of a third person? Was the scope of its agreement larger than the ordinary undertaking of a person who assumes to move valuable property; that is, an undertaking to exercise skill and care? To our minds, the respondent's own testimony furnishes a conclusive answer to this inquiry. She swore the appellant's manager, Langdale, with whom she made the contract, said he was responsible, "and would move them [the goods] with care, and deliver them safely." Plainly, the only undertaking by Langdale, to be gathered from that statement, was for the careful moving and safe delivery of the property; that is, he assumed responsibility for care in moving and for safe delivery as far as appellant's servants were concerned, not for the safety of the goods in any event, including the chance of malicious destruction by an outsider. * * *

In our judgment, no broader contract is justly deducible from what passed between the parties than the ordinary one of a bailment for

hire; the undertaking of a private carrier to use care and skill. There was no warranty against every loss, and no thought in the mind of either party of such a loss as happened, or of any loss from extraneous causes. The true meaning and obligation of the undertaking the testimony goes to show the appellant company assumed has been expounded by judges in considered cases, and by commentators, too. In Story on Bailments (section 457), after the statement that a private carrier will be held liable for any loss within the scope of his contract, this statement follows: "But even an express undertaking by a private person to carry goods safely and securely is but an undertaking to carry them safely and securely, free from any negligence of himself or his servants; and it does not insure the safety of the goods against losses by thieves, or any taking by force." * * *

It is patent on the face of the conversation between appellant's manager, Langdale, and the respondent and her daughter, which conversation formed the contract between the parties, that the respondent was solicitous about the care and skill with which her goods would be handled, and Langdale was assuring her on that point. Nothing was shown which fairly can be interpreted, in the light of similar cases, as an assumption by Langdale of any risk of loss or injury to the goods from the unsuspected malice of a stranger, or of any risk except from the neglect or lack of skill of appellant's servants. The portrait was injured solely by the mischievous act of a boy who chanced to go by while the picture was being prepared for safe carriage in the appellant's van. We hold that the appellant was not responsible for that loss on the showing made.

No question has been presented on this appeal as to appellant's responsibility for the mirror.

It was erroneous, we think, to refuse the instruction requested by the appellant that it was charged with reasonable care in handling and removing the oil portrait, as that was the true test of its duty.

The judgment is reversed, and the cause remanded. All concur.[5]

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## COGGS v. BERNARD.

**(Court of Queen's Bench, Trinity Term, 1703. 2 Ld. Raym. 909.)**

Action on the case.

HOLT, C. J.[6] The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there

[5] See, also, Standard Brewery v. Malting Co., 171 Ill. 602, 49 N. E. 507 (1898).

[6] The statement of facts, the opinions of Gould, Powys, and Powell, JJ., and parts of the opinion of Holt, C. J., are omitted.

has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments.

The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a "depositum," and it is that sort of bailment which is mentioned in Southcote's Case, 4 Rep. 83b.

The second sort is, when goods or chattels that are useful are lent a friend gratis, to be used by him; and this is called "commodatum," because the thing is to be restored in specie.

The third sort is, when goods are left with the bailee to be used by him for hire; this is called "locatio et conductio," and the lender is called "locator," and the borrower "conductor."

The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, "vadium," and in English, a "pawn" or a "pledge."

The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them.

The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case.

I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. * * * For if he keeps the goods bailed to him but as he keeps his own, though he keeps his

own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. * * *

As to the second sort of bailment, viz. commodatum, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable. * * *

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. * * *

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called "mandatum." It is an obligation which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3. tit. 27, 684, defines mandatum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. * * *

The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretense of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. * * *

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case

as this it signifies an actual entry upon the thing and taking the trust upon himself.[7] And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

The 19 Hen. VI, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. IV, 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie.[8] But there the question was put to the court, What if he had built the house unskillfully? and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Riches & Brigges, Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case. Pickas v. Guile, Yelv. 128.

But those cases were grumbled at; and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in Steer v. Scoble, 2 Cro. 667, Tr. 21 Jac. I, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Mors v. Slue [post, p. 313] was drawn by the greatest drawer in England in that time; and in that declaration, as it was always in all such cases, it was thought most prudent to put in that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original.

I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

Read.

[7] See Professor James Barr Ames, The History of Assumpsit, 2 Harv. Law Rev. 1, 5.

[8] See The History of Assumpsit, supra, at page 10.

## TRACY v. WOOD.

(Circuit Court, D. Rhode Island, 1822. 3 Mason, 132, Fed. Cas. No. 14,130.)

Assumpsit for negligence in losing 764½ doubloons, intrusted to defendant, a money broker, to be carried gratuitously from New York to Boston. Defendant put the coins, which were in two bags, into a valise with money of his own, brought the valise in the evening aboard a steamboat which was to start the next morning, and left it in a berth in the forward cabin. He then went to a theater, and on his return slept in the middle cabin. In the morning one of the bags was gone. Defendant left the valise on a table in the cabin for a few moments while he went on deck to send information of the loss to the plaintiff, the loss then being known to a large number of passengers. When he came back the second bag was gone. Many other circumstances were proved.

STORY, Circuit Justice,* after summing up the facts, said: I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. * * *

The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. * * *

It appears to me, that the true way of considering cases of this nature, is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence: nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of com-

* The statement has been rewritten, and parts of the opinion omitted.

mon prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiff's. Still if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.[10]

Verdict for the plaintiffs for $5,700, the amount of one bag of the gold; for the defendant as to the other bag.

[10] See, also, Nelson v. MacKintosh, 1 Starkie, 237 (1816); Jenkins v. Motlow, 1 Sneed (Tenn.) 248, 60 Am. Dec. 154 (1853); Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168 (1821); Knowles v. Atlantic R. Co., 38 Me. 55, 61 Am. Dec. 234 (1854); Clark v. Eastern R. Co., 139 Mass. 423, 1 N. E. 128 (1885); Prof. J. H. Beale, Gratuitous Undertakings, 5 Harvard Law Rev. 222.

"The word '*culpa*' nearly coincides in meaning with the English law term 'negligence.' It was formerly thought that three degrees of *culpa* or negligence were recognized by the Roman law. These were the *culpa lata*, the *culpa levis*, and the *culpa levissima*—gross negligence, negligence, and slight negligence. Lord Holt brought this theory into the English law, by his opinion in Coggs v. Bernard [ante, p. 8]. In his essay on Bailments, Sir William Jones adopted it from Pothier, and from the case of Coggs v. Bernard, and brought it into great prominence. Mr. Justice Story also gave his countenance to the theory. * * * The doctrine of three degrees fails in reconciling those texts of the Roman law, to which, if correct, it should be applicable. The terms—*lata, latior; levis, levior, levissima; diligens, diligentissimus; exacta, exactissima*—where they occur in the Corpus Juris, are now considered simply as variations of style, used without a thought of the distinctions which the commentators endeavored to found upon them. According to the now established opinion, the Roman law in most cases required of a person the conduct of a prudent man—*diligentia diligentis patris familias* (the care of a prudent person who is *sui juris*). In a few cases, as, for instance, in suits between partners, the defendant might show in defense that he conducted the partnership affairs with as much care as he used about his own; it being his partner's loss if he chose to enter into that relation with a careless man." N. St. J. Green, note to Story on Agency (8th Ed.) § 184.

In Chicago, R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187 (1905), it was held that a contract exempting a railroad from liability to a Pullman porter for negligent injury was valid, though the negligence were gross. Cartwright, C. J., said: "We are of opinion that no distinction as to the rights of the parties can be founded upon speculation as to different degrees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded that the defendant was guilty of gross negligence. Formerly this court, in expounding the doctrine of comparative negligence, classified negligence into three degrees, as slight, ordinary, and gross; but that doctrine was long ago abolished, and, while negligence may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question and no liability has been based on any distinction in degrees unless the negligence was willful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence merely there is no intention to do a wrongful act or omit the performance

## FLINT & P. M. RY. CO. v. WEIR.

(Supreme Court of Michigan, 1877. 37 Mich. 111, 26 Am. Rep. 499.)

Assumpsit. Defendant brings error.

COOLEY, C. J.[11] The manner in which this case is submitted makes the record present substantially this question: Whether in the court below there was any evidence tending to prove the plaintiff's case? * * *

The evidence was put into the case by stipulation, and in the main the facts are undisputed. It appears that the plaintiff took passage upon the cars of the defendant from Detroit to Saginaw, and that he had with him a trunk, which he avers contained the articles of personal property described in the declaration. This trunk has been lost, but whether through any fault of the railway company is in dispute. It is, however, shown by the plaintiff himself that both he and his trunk were being carried, not for hire and reward, but gratuitously. There was consequently no contract for carriage by the railway company, and this action, which is in assumpsit, cannot be maintained. Nolton v. Western R. Corp., 15 N. Y. 444, 446, 69 Am. Dec. 623.[12]

There can be no question that a railway company which receives property for gratuitous carriage assumes, like any other gratuitous bailee, certain duties in respect to it, and that a suit will lie for a failure to perform these duties. * * * The gratuitous bailee must not be reckless. He must observe such care as may reasonably be required of him under the circumstances; but it is not the same care which is required of the bailee who, for his own profit, assumes the duty. This is elementary, and is so reasonable that it requires no discussion. When care is bargained for and compensated, something is expected and is demandable beyond what can be required of him who undertakes a merely gratuitous favor. * * *

of a duty. * * * One of the reasons given by the courts for disregarding supposed distinctions in degrees of negligence is the inability to give the terms 'slight,' 'ordinary,' and 'gross' any definite meaning and the impracticability of applying any rule based on the supposed distinction. It is clear that negligence cannot be divided into slight, ordinary, and gross by definite lines, so that a jury may understand the limits of each and assign each case to its own department. * * * In Wilson v. Brett, 11 Mees. & W. 113 (1843), it was held that there is no legal difference between negligence and gross negligence, that it is the same thing with the addition of a vituperative epithet, and that the question in any case is whether there was culpable negligence. * * * It will be found that the words 'slight,' 'ordinary,' and 'gross,' as applied to negligence, are not used in the decisions with the same meaning or any definite and well understood meaning."

See, also, Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374 (1875); Griffith v. Zipperwick, 28 Ohio St. 388 (1876); Rideout v. Winnebago Trac. Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601 (1904); The Three Degrees of Negligence, 8 Am. Law Rev. 649.

[11] Parts of the opinion are omitted.

[12] But see Coggs v. Bernard, ante, p. 8; McCauley v. Davidson, 10 Minn. 418, Gil. 335 (1865); Pollock on Contracts, 178; 2 Harvard Law Rev. 6; 5 Harvard Law Rev. 224.

But as the plaintiff has brought his action, not in tort, but upon contract, there can be no recovery under his declaration, and the extent of the duty which, under the circumstances, was imposed upon the railway company becomes immaterial. The judgment must be reversed, with costs, but as the facts are not embodied in a finding by the circuit judge, so as to permit of our entering final judgment in this court, a new trial must be ordered.

# CHAPTER II

# THE OBLIGATION OF A COMMON CARRIER

## SECTION 1.—DUTY TO SERVE

### JACKSON v. ROGERS.

(Court of King's Bench, Mich. Term, 1683. 2 Show. 327.)

Action on the case, for that whereas the defendant is a common carrier from London to Lymmington et abinde retrorsum, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.

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HOLT, C. J.,[1] in LANE v. COTTON, 12 Mod. 472 (1701): "* * * Wherever any subject takes upon himself a public trust for the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see Kelway 50. If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of trade. If an innkeeper refuse to entertain a guest, where the house is not full, an action will lie against him: and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be taken by a carrier; and I have known such actions maintained, though the cases are not reported. * * * If the inn be full or the carrier's horses

[1] The action was against the Postmaster General for the loss of a letter stolen in the post office. Lord Holt dissented from a decision in favor of the defendant.

loaden, the action would not lie for such refusal, but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public. Sure then where it is a public employment created by law, the obligation is the greater; as if the sheriff refuse a writ, an action will lie against him, because the law charges him with an employment for the conveniency and good of the public."

## SECTION 2.—LIABILITY FOR DAMAGE OR LOSS[2]

### HALE v. NEW JERSEY STEAM NAVIGATION CO.

(Supreme Court of Connecticut, 1843. 15 Conn. 539, 39 Am. Dec. 398.)

WILLIAMS, C. J.[3] This suit was brought for two carriages, shipped on board the Lexington, against the defendants, as common carriers, to be transported in said boat for hire, from New York to Boston or Providence. The boat and goods were destroyed by fire in the sound; and a verdict being given for the plaintiff, the defendants excepted to the charge,[4] and claimed:

1. That they were not common carriers, nor subject to the rules that govern common carriers. It was long since settled, that any man, undertaking for hire to carry the goods of all persons indifferently, from place to place, is a common carrier; Gisbourn v. Hurst, 1 Salk. 249. Common carriers, says Judge Kent, consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea, and in the aggregate body are included the owners of stage coaches, who carry goods, as well as passengers, for hire, wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water craft, including steam vessels, and steam towboats belonging to internal, as well as coasting and foreign navigation, lightermen, and ferrymen. 2 Kent's Com. (2d Ed.) 598. And there is no difference between a land and a water carrier. Proprietors of Trent Navigation v. Wood, 3 Esp. Cas. 127; Elliott v. Rossell, 10 Johns. (N. Y.) 7, 6 Am. Dec. 306; Story on Bail. 319, 323.

[2] For a common carrier's liability for injury to passengers, see part IV, chapter II, post, pp. 326-344.

[3] The statement of facts and parts of the opinion are omitted.

[4] The court charged the jury "that * * * those persons, who undertake generally to transport goods for hire, for all persons indifferently, and deliver them at a place appointed, are deemed common carriers, whether by sea or land, through the Sound or on rivers, in ships or steamboats. Common carriers are liable for goods received to transport and deliver, if not delivered, except the loss arise from the act of God, or the public enemies. By the act of God is meant something in opposition to the act of man—something superhuman."

But it is said the rule established is a harsh one, and ought not to be extended. Chancellor Kent takes a very different view of it. He speaks of it as a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation (2d vol. 602); and with similar views, this court has said, we are not dissatisfied with the reasons which originated the responsibility of common carriers, and believe they apply, with peculiar force, at this day, and in this country, as it respects carriers by water, more especially upon which element a spirit of dangerous adventure has grown up, which disregards the safety, not of property merely, but of human life (Crosby v. Fitch, 12 Conn. 419, 31 Am. Dec. 745). And while we are not called upon to extend the principle, we can not yield to the argument that common carriers are not to be responsible when the loss arises from the producing agent of the propelling power.

If the defendants are common carriers, the question must be merely what are the liabilities of common carriers? The answer is, for all losses, even inevitable accidents, except they arise from the act of God, or the public enemy. Forward v. Pittard, 1 T. R. 34 [post, p. 318]; Coggs v. Bernard, 2 Ld. Raym. 918 [post, p. 317]. And by the act of God is meant, something superhuman, or something in opposition to the act of man. Forward v. Pittard, 1 T. R. 33. In all cases except of that description, the carriers warrant the safe delivery of the goods (per Kent, C. J., Elliott v. Rossell, 10 Johns. [N. Y.] 7, 6 Am. Dec. 306); and masters and owners of vessels are liable as common carriers, as well at sea as in port. * * *

But it is said, there is no case where the liability is extended to fire on the high seas. If the principle covers such cases, then it is to be supposed the reason such cases are not to be found, is that they have not occurred, or were not contested. If the carrier is subjected for the loss of goods burnt on land, where he was in no fault, we see no reason for exempting the carrier at sea, under similar circumstances. We apprehend a rule of policy, Lord Mansfield says, in the case alluded to, to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carriers. He is in the nature of an insurer. Every reason here given applies as well to the owners of a steamboat as to the wagoner, whose carriage was burnt without his fault, in the barn where he placed it—the same danger of collusion, of litigation, and the same difficulty in unraveling circumstances. If the policy of the law requires that one shall be an insurer, we think the same policy requires that the other should also be so treated. And if it be true that trade will regulate itself when the rule is understood, compensation will be made, not only in proportion to the labor, but to the risk. And in a recent case in New York, steamboat owners are treated as other common carriers. Powell et al. v. Myers, 26 Wend. 591. * * *

New trial not to be granted.

# CHAPTER III

# WHAT IS CARRIAGE

## BUCKLAND v. ADAMS EXPRESS CO.

**(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 124, 93 Am. Dec. 68.)**

Contract to recover the value of a case of pistols. In the superior court judgment was entered for the plaintiffs on agreed facts; and the defendants appealed to this court.

BIGELOW, C. J.[1] We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. The statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight v. Brewster, 1 Pick. 50, 53, 11 Am. Dec. 133 [post, p. 34]; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189; 2 Redfield on Railways, 1–16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted

[1] Parts of the statement of facts and of the opinion are omitted.

to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part, at least, by means of agencies over which the carrier can exercise no management or control whatever.

But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control.

The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into

which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered.

It is not denied that in the present case the goods were lost or destroyed while they were being carried over a portion of the route embraced in the contract with the plaintiffs, and before they had reached the point to which the defendants had agreed to carry them. It is not a case where the agreement between the parties was that the merchandise was to be delivered over by the defendants to other carriers at an intermediate point, thence to be transported over an independent route to the point of destination without further agency on the part of the defendants. The stipulation was that the defendants should carry the property from the place where they received it to the point where it was to be delivered into the hands of the consignee. The loss happened before the defendants had fulfilled their promise. * * *

Judgment for the plaintiffs.

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## ROBERTS v. TURNER.

**(Supreme Court of Judicature of New York, 1814. 12 Johns. 232.)**

This was an action on the case, against the defendant, as a common carrier.

The defendant resided at Utica, and pursued the business of forwarding merchandise and produce from Utica to Schenectady and Albany. The ordinary course of this business is, for the forwarder to receive the merchandise or produce at his store, and send it by the boatman, who transports goods on the Mohawk river, or by wagon to Schenectady or Albany, for which he is paid at a certain rate per barrel, etc.; and his compensation consists in the difference between the sum which he is obliged to pay for transportation, and that which he receives from the owner of the goods.

The defendant received from the plaintiff, who resided in Cazenovia, in Madison county, by Aldrich, his agent, twelve bartels of pot ashes, to be forwarded to Albany, to Trotter; the ashes were put on board a boat, to be carried down the Mohawk to Schenectady, and whilst proceeding down the river, the boat ran against a bridge and sunk, and the ashes were thereby lost.

The defendant's price for forwarding goods to Schenectady was twelve shillings per barrel, and the price which he had agreed to pay for the transporting the goods in question to that place was eleven shillings; the defendant had no interest in the freight of the goods, and was not concerned as an owner in the boats employed in the carriage of merchandise.

The judge being of the opinion that the testimony did not make out the defendant to be a common carrier, nonsuited the plaintiff; and a motion was made to set aside the nonsuit.

SPENCER, J.[2] On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common carrier, either from the nature of his business, or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany; and that he delivered the ashes, with instructions from the plaintiff to send them to Colonel Trotter.

The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud. To extend this rigorous law to persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known (for his agent knew), that the defendant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced should be deemed an insurer of goods forwarded by him, an insurer too, without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier (Hyde v. Navigation Co., 5 T. R. 394), makes this the criterion to determine his character: Whether, at the time when the accident happened, the goods were in the custody of the defendants as common carriers. In Garside v. The Proprietors of the Trent and Mersey Navigation, 4 T. R. 581, the defendants, who were common carriers, undertook to carry goods from Stoneport to Manchester, and from thence to be forwarded to Stockport. The goods arrived at Manchester, and were put into the defendants' warehouse, and burnt up before an opportunity arrived to forward them. Lord Kenyon held, the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying that the responsibilities of a common carrier and forwarder of goods rest on very different principles.

In the present case, the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful boatman. * * *

Motion denied.[3]

[2] Part of the opinion is omitted.

[3] For the undertaking of a forwarder, see Hutchings v. Ladd, 16 Mich. 493 (1868); Northern R. Co. v. Fitchburg R. Co., 6 Allen, 254 (1863); Stannard v. Prince, 64 N. Y. 300 (1876). Compare Lee v. Fidelity Co., 51 Wash. 208, 98 Pac. 658 (1908).

In Parker v. No. Ger. Lloyd S. S. Co., 74 App. Div. 16, 76 N. Y. Supp. 806 (1902), plaintiff, arriving at Bremen on defendant's steamer from New York,

## MANN v. WHITE RIVER LOG & BOOMING CO.

**(Supreme Court of Michigan, 1881. 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141.)**

Assumpsit on common and special counts. Plaintiff brings error.

CAMPBELL, J. Plaintiff sued defendant for not delivering part of a quantity of logs which the company had in charge to deliver at White Lake, after running them down from their place of reception on White river. As the case was passed upon by the jury they necessarily found that there had been no fault or negligence in defendant, and the only question before us is whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty.

The duty undertaken by the defendant was in accordance with its statutory power to drive, run, raft and boom logs in White river for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates, and for all alike.

The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage.

It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. Laws, § 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for.

These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies

wanted his trunks sent to England. Defendant gave him a receipt worded in part as follows: "North German Lloyd Baggage Department, Bremen. Received from S. S. Grosser Kurfürst two trunks for transfer by slow freight to Charles N. Parker, via London, 18 Waterloo street, Hove-Brighton." Defendant delivered the trunks to an express company to be carried to Brighton, but they were burned on the way. Hirschberg, J., said: "The transportation of the plaintiff and his baggage on the defendant's steamer was complete when they reached Bremen, and the further engagement as to the trunks was a contract to forward them by slow freight, which the defendant fulfilled when it 'transferred' them in the usual and customary way to a reliable express company for that purpose."

"Whether the defendant used the term 'carry' or 'transport' or 'forward' the goods from New York to Louisville is wholly immaterial, so long as he undertook the reception of the goods here and their delivery there. His duty embraced everything necessary to be done to accomplish a delivery of the goods at the place designated, and the compensation stipulated for the contract was an expressed equivalent for the whole service. Whether the defendant used his own means of transportation in the service to be performed, or made his own private arrangements with others to perform the actual transportation, did not affect his relation to the owners of the goods with whom he had agreed to receive and deliver them." Woodruff, J., in Read v. Spaulding (N. Y.) 5 Bosw. 395, 404 (1859) printed on another point, post, p. 64.

shall be so treated, and the whole matter is left to be determined by legal analogies.

When we look at the business done, it will be found to resemble in some respects the business of carriage, and in some respects it is like different business, while in most things it is peculiar and subject to its own conditions. It has one peculiarity in which it differs entirely from common carriage, which was held by this court in Fitch v. Newberry, 1 Doug. 1, 40 Am. Dec. 33, to create no rights against property not voluntarily entrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream. Comp. Laws, § 2793.

The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct the floatage. And it is to prevent this that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness.

Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are at least quite as analogous as carriage. Drovers—or, as the common law calls them, agisters—perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443. The entire absence of any motive power,

and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship and often wrong in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we cannot wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants.

The judgment must be affirmed, with costs.

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## THE NEAFFIE.

**(Circuit Court, D. Louisiana, 1870. 1 Abb. 465, Fed. Cas. No. 10,063.)**

WOODS, Circuit Judge.[4] The case was this: On May 28, 1866, the steam tug Neaffie undertook to tow a flat or barge laden with hay from Jefferson City to the flatboat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by the Neaffie sunk. The damage sustained by the sinking of the flat is agreed to be thirty-one hundred and fifty dollars. * * * No witness speaks of any act done or omitted showing want of skill or care on the part of the Neaffie.

Under this state of facts the Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier. The business of the Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be: "One who undertakes for hire to transport the goods of such as choose to employ him from point to point." This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is: "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage."

Was the Neaffie a common carrier under either of these definitions? Chief Justice Marshall, in Boyce v. Anderson, 2 Pet. (27 U. S.) 150,

[4] Part of the opinion is omitted.

7 L. Ed. 379 [post, p. 359, note 11], says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers.

Can it be said that the tugboats plying in the harbor of New Orleans undertake to transport the goods found on the water craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case.

The tugboats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the towboat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That towboats are not common carriers has been held in the following cases: Caton v. Rumney, 13 Wend. (N. Y.) 387; Alexander v. Greene, 3 Hill (N. Y.) 9; Wells v. Steam Nav. Co., 2 N. Y. 204; Pennsylvania, D. & Md. Steam Nav. Co. v. Dandridge, 8 Gill. & J. (Md.) 248, 29 Am. Dec. 543; Leonard v. Hendrickson, 18 Pa. 40, 55 Am. Dec. 587.

In Vanderslice v. The Superior, Fed. Cas. No. 16,843, Mr. Justice Kane held a steam towboat liable as a common carrier; but when the case came before the circuit court, Mr. Justice Grier said he could not assent to the doctrine.

I am aware that a contrary doctrine has been applied by the supreme court of Louisiana to steam tugs towing between the city of New Orleans and the mouth of the Mississippi river. These towboats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold towboats not to be common carriers.

Holding, then, that the Neaffie was not a common carrier, and that

she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of the Neaffie, it follows that the libel must be dismissed at the costs of the libelant. The cross libel of claimants, not being supported by any proof, is also dismissed.

Libels dismissed.[5]

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## ROBERTSON v. OLD COLONY R. CO.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482.)

Tort for personal injuries. Trial before Bishop, J., who reported the case for the determination of this court.[6]

LATHROP, J. Unless the defendant was under a common law or statutory obligation to carry the plaintiff in the manner he was car-

[5] In The Steamer Webb, 14 Wall. 406, 414, 20 L. Ed. 774 (1871), Strong, J., said: 'It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. * * * The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

In The Minnehaha, 1 Lush. 335, 347 (1861), Lord Kingsdown said: "When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a vis major, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved of her obligations." It was held accordingly that the tug was entitled to a salvage reward for rescuing the tow from extraordinary sea perils by incurring risks and making exertions not within the scope of her engagement to tow. A carrier, however, is not entitled to salvage for rescuing his cargo from extraordinary sea perils. The Aguan (D. C.) 48 Fed. 320 (1891); The C. P. Minch, 73 Fed. 859, 20 C. C. A. 70 (1896).

Under the ordinary contract of towage, a tug is not a carrier, even though it has exclusive possession of the tow. Brown v. Clegg, 63 Pa. 51, 3 Am. Rep. 522 (1870); The D. Newcomb (D. C.) 16 Fed. 274 (1883), semble; The A. R. Robinson (D. C.) 57 Fed. 667 (1893); Knapp v. McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 (1899), semble. But if the owner of tug makes a contract of carriage, he is liable as a carrier, though the transportation is by agreement performed by towing. The Northern Belle, 9 Wall. 526, 19 L. Ed. 746 (1869); Hibernia Ins. Co. v. St. Louis Trans. Co., 120 U. S. 166, 7 Sup. Ct. 550, 30 L. Ed. 621 (1887); The Nettie Quill (D. C.) 124 Fed. 667 (1903); Bassett v. Aberdeen, etc., Co., 120 Ky. 723, 88 S. W. 318 (1905). In Bussey v. Mississippi Valley Trans. Co., 24 La. Ann. 165, 13 Am. Rep. 120 (1872), the defendants, owners of the steamboat Bee, gave a bill of lading at St. Louis for one barge loaded with hay and corn "in apparent good order in tow of the good steamboat Bee and barges, * * * to be delivered without delay in like good order (the dangers of navigation, fire, explosion, and collision excepted) to Bussey & Co., at New Orleans, La., on levee or wharfboat, he or they paying freight at the rate annexed." Howe, J., said: "We must think that in all reason the liability of the defendants, under such circumstances, should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug."

[6] The statement of facts is abridged.

ried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus whose servant the plaintiff was. By the terms of this contract, the defendant agreed to haul certain cars belonging to the circus proprietors, according to a schedule of time fixed by the agreement, by which the work was to be done at 18 different times, and nearly all of it at night. The price to be paid was a gross sum, stated in the agreement to be less than the regular rates of the defendant for such service. The proprietors agreed, at their own expense, and under their own supervision, and without responsibility on the part of the defendant, to load and unload the cars, "to exonerate and save harmless" the defendant "from any and all claims for damages to persons and property during the transportation aforesaid, however occurring," and to "assume all risk of accident from any cause."

The plaintiff's evidence tended to show that the injury occurred by one of the cars running off the track by reason of its trucks not being in proper condition, and contended that that fact was evidence that proper inspection of the trucks by the defendant would have revealed their condition, and that the defendant was bound to make such inspection. We need not consider whether the offer of proof was sufficient, if it was the duty of the defendant to inspect the cars, for we are of opinion that it was not its duty to inspect the cars. The defendant had no control over the condition of the cars, and no power to interfere with them. The contract was simply to haul the cars as they were. This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier. Coup v. Railway Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374.

The ruling of the judge below was right; and, according to the terms of the report, there must be judgment on the verdict for the defendant. So ordered.[7]

[7] In Coup v. Railway Co., cited above, Campbell, J., speaking of a contract like that in the principal case, said: "It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers."

In Clough v. Grand Trunk W. R. Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446, (1907), Lurton, J., said: "The engine and train were under the control of servants of the railway company, but under a contract by which they became, for the purpose of moving this train, the special servants acting under orders and directions and in behalf of the circus company. * * * We see no illegality in a railway company permitting a use of its tracks by another which does not substantially disable it from the usual and ordinary performance of its corporate duties to the public. * * * This train under this contract was, at the time, being run or operated by the special servants of the

## EDWARDS v. MANUFACTURERS' BLDG. CO.

**(Supreme Court of Rhode Island, 1905. 27 R. I. 248, 61 Atl. 646, 2 L. R. A. [N. S.] 744, 114 Am. St. Rep. 37.)**

Trespass on the case for negligence.

DOUGLAS, C. J.[a] The plaintiff was an employé of one of the defendant's tenants, and was injured by the falling of an elevator which the defendant maintained and operated in its building for the use of its tenants and their employés and customers. After verdict for the plaintiff, the defendant brings its petition for a new trial, founded upon the allegations that the verdict is against the evidence, that the presiding justice erred in refusing to charge the jury as requested by the defendant, and that the damages were excessive.

The defendant's requests which were refused, and to which exceptions were taken, were: "(1) The owner of a building containing a passenger elevator therein operated by such owner is not a common carrier, and not an insurer of the safety of persons using the elevator. (2) If the jury find that the defendant used reasonable care and prudence in the construction, maintenance, and operation of the elevator, the verdict should be for the defendant." * * *

We think the first and second requests should have been granted. A landlord who maintains an elevator in his private building is not a common carrier, and a common carrier is not an insurer of the safety of passengers. And it seems to us unreasonable to say that such a landlord is to be held to the same degree of care which the law imposes upon a common carrier.

The charge of the court was based upon the case of Marker v. Mitchell (C. C.) 54 Fed. 637, which holds that the liability of a landlord maintaining an elevator and that of a common carrier of passengers are the same; that the standard for both is the highest degree of care which human foresight can suggest. This case is supported by Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16

circus company, and their acts were the acts of that contractor, and not the acts of the railway company."

A railroad company, which receives cars from a connecting carrier for transportation over its line, presumably takes them for carriage, and in absence of special contract is liable for damage to the cars themselves, as well as to their contents, though free from negligence. Pa. R. Co. v. New Jersey, etc., Co., 27 N. J. Law, 100 (1858); Vt. & Mass. R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785 (1867); Peoria, etc., Co. v. Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605 (1884); Mo. Pac. Ry. Co. v. Chicago & A. Co. (C. C.) 25 Fed. 317 (1885). It is otherwise where the railroad has by contract the use of the cars. St. Paul, etc., R. Co. v. Minneapolis, etc., Co., 26 Minn. 243, 2 N. W. 700, 37 Am. Rep. 404 (1879). Or undertakes merely to give its services in switching them. Texas & Pac. Ry. Co. v. Henson (Tex. Civ. App.) 121 S. W. 1127 (1909). A terminal company, which contracts with a railroad to haul passenger trains over the terminal company's track, does not become a carrier of passengers. Keep v. Indianapolis, etc., R. Co. (C. C.) 9 Fed. 625 (1881).

[a] Parts of the opinion are omitted.

Am. St. Rep. 700, and Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. And the United States Court of Appeals confirmed the decision in Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33, where the court say: "We see no distinction in principle between the degree of care required from a carrier of passengers horizontally by means of railway cars or stagecoaches and one who carries them vertically by means of a passenger elevator. The degree of care required from carriers by railway or stagecoach is the highest degree. Neither is an insurer, but in regard to each care short of the highest degree becomes not ordinary care, but absolute negligence." These cases seem to have been generally followed. Edwards v. Burke, 36 Wash. 107, 78 Pac. 610.

We cannot assent to the reasoning on which they rely. It is true that whether a common carrier operates a stagecoach, a railway on the surface of the ground, or a railway up a mountain side, the law subjects him to a certain rule of responsibility; but the rule is imposed not on account of the danger of the journey, but because of his relation to the public. If a private person transports a friend in his coach or in his automobile, he is liable only for want of ordinary care, though the danger may be the same as in traveling by public coach or by railway. The duty of a landlord towards those who enter upon his premises by implied invitation is to exercise reasonable care for their safety, and we see no reason for modifying the rule when he introduces and operates an elevator. He is not, like a common carrier, a servant of the public. His relations and duties are with a limited number of persons who have contracted with him for the use of his premises, and others who have business with his tenants. The doctrine of the cases cited above is examined and repudiated by the New York Court of Appeals in Griffen v. Manice, 166 N. Y. 197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, decided in 1901. * * *

As the defendant must have been prejudiced by the erroneous statements of the measure of its duty, a new trial must be granted, and it is unnecessary for us to comment upon the evidence presented.

The petition is granted, and the cause is remanded to the common pleas division for further proceedings.

## FARLEY v. LAVARY.

(Court of Appeals of Kentucky, 1900. 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383.)

WHITE, J.* This action was brought by appellee for damages for the destruction of certain household goods. The allegations of the petition are that appellant, doing business as the Farley Transfer Company, contracted, for hire, to carry these household goods from Lexington to Nicholasville, and that while the goods were in the possession of appellant they were destroyed by reason of the negligence of the servants and employés of appellant in charge of the wagon. It is alleged that appellant is engaged in the business of, and is, a common carrier. The damage claimed is $500.

The answer denied that appellant was a common carrier at all; admitted a contract with appellee to haul by wagon her household goods from Lexington to Nicholasville, and admitted that while in transit certain of the goods were destroyed by fire, and other articles damaged, but denied that by reason thereof appellee was damaged to the extent of $500, or in any sum exceeding $250. The answer further pleaded that the destruction and damage to the goods by fire were without fault on his part, and denied that the fire was caused by the negligence of any of his servants.

The issue was tried before a jury, who returned a verdict for $400 for appellee. Judgment was entered accordingly, and from that judgment this appeal is prosecuted.

The facts proven on the trial without material controversy are that appellant, doing business as the Farley Transfer Company, had a number of vehicles running in the city of Lexington, all duly and regularly licensed to haul for hire; that in such business he hauled for any and all persons, and goods and merchandise of all kinds; that he hauled in the city and about the city, to the fair grounds, and other places. There was no dispute as to the contract with appellee to haul the household goods, nor of the fact of damage. As the cause of the fire, there was some proof that the driver was smoking; and, unless the fire caught from his pipe or cigar, it is unexplained how it originated. The proof as to the amount of the loss is conflicting. * * *

If appellant was a common carrier in carrying these goods, his liability stands admitted; for he nowhere pleads that the damage was caused by the act of God, the public enemy, or the inherent quality of the goods. We are of opinion that by the evidence of appellant himself it is shown that he was a common carrier within the limits of the city of Lexington. He admits that he hauled for all or any persons, and had obtained a license so to do. Being a common carrier, appellant could have been compelled to haul for appellee within the terri-

* Parts of the opinion are omitted.

tory in which he was engaged, but she could not have compelled him to go outside his territorial limit. In this case, however, he contracted to go beyond his territory.

Applying the facts to a railroad, we should say he agreed to go beyond the end of his line. It has repeatedly been held that, while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracted to convey beyond its line, it would be liable as a common carrier for the whole distance. * * *

There appears to us no error in the record. The judgment is therefore affirmed, with damages.[10]

[10] Acc. Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834); Jackson Arch. Iron Works v. Hurlbut, post, p. 38, note. Compare Armfield v. Humphrey, 12 Ill. App. 90 (1882); Williams v. O'Daniels, 35 Tex. 542 (1872); Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555 (1889).

*Receivers operating a railroad* are common carriers, and, where not exempt from suit as officers of the court, are liable for nonnegligent loss of goods. Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350 (1866); Paige v. Smith, 99 Mass. 395 (1868). Trustees for bondholders operating a railroad after foreclosure are common carriers. Rogers v. Wheeler, 43 N. Y. 598 (1871).

A *pilot* is not a carrier, though in charge of the navigation of the ship. The Tom Lysle (D. C.) 48 Fed. 690 (1891).

A *master of a vessel*, who hires seamen, navigates his ship, and signs bills of lading so as to be personally liable to shippers of cargo as a common carrier, is not liable as a carrier to his employer; and, though the latter has had to pay shippers for damage to cargo, he has no remedy against the master, unless the loss was due to the master's fault. Mepham v. Biessel, 9 Wall. 370, 19 L. Ed. 677 (1869), affirming Bissell v. Mepham, 1 Woolw. 225, Fed. Cas. No. 1,450 (1868).

A *canal company* is not a carrier, if it does not operate the boats which pass over it. Watts v. Canal Co., 64 Ga. 88, 37 Am. Rep. 53 (1879).

Nor is one who maintains a *toll bridge*. Grigsby v. Chappell, 5 Rich. (S. C.) 443 (1852); Kentucky Bridge Co. v. Louisville & N. R. Co. (C. C.) 37 Fed. 567, 616, 2 L. R. A. 289 (1889).

*Public hackmen* are generally treated as carriers. Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799 (1878); Bonce v. Railway Co., 53 Iowa, 278, 5 N. W. 177, 36 Am. Rep. 221 (1880). But see Ross v. Hill, 2 C. B. 877 (1846); Brown v. N. Y., etc., R. Co., 75 Hun, 355, 27 N. Y. Supp. 69, 71 (1894). As to keepers of livery stables, see Siegrist v. Arnot, 86 Mo. 200, 56 Am. Rep. 424 (1885); Payne v. Halstead, 44 Ill. App. 97 (1892); Erickson v. Barber, 83 Iowa, 367, 49 N. W. 838 (1891); Stanley v. Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561 (1905); Copeland v. Draper, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. Rep. 314 (1893).

*District messenger companies* have been held not to be carriers, on the ground that they merely furnished messengers whom their customers might employ. Haskell v. Boston D. M. Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324 (1906); Hirsh v. Am. Dist. Tel. Co., 112 App. Div. 265, 98 N. Y. Supp. 371 (1906). But in Am. Dist. Tel. Co. v. Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479 (1890), where a messenger was employed to drive horses to a stable, it was held that the jury were justified in finding that the company undertook to do the driving through their servant, so as to be liable for injury to the horses by his negligence. And in Sanford v. Am. Dist. Tel. Co., 13 Misc. Rep. 88, 34 N. Y. Supp. 144 (1895), and Gilman v. Postal Tel. Co., 48 Misc. Rep. 372, 95 N. Y. Supp. 564 (1905), companies whose boys carried parcels were considered to be common carriers.

Railroads and others *transporting the mail* act, not as carriers, but as persons in government service, and are not liable to owners of lost letters. Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504 (1877); Central R. Co. v. Lampley,

76 Ala. 357, 52 Am. Rep. 344 (1884), at least in the absence of fault; German St. Bk. v. Minneapolis, etc., Co., 113 Fed. 414 (1901); Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796 (1902).

*Telegraph companies.* In Fowler v. Western Union Co., 80 Me. 381, 387, 15 Atl. 29, 30, 6 Am. St. Rep. 211 (1888), Foster, J., said: "It is now perfectly well settled, by the great weight of judicial authority, that although telegraph companies are engaged in what may appropriately be termed a public employment, and are therefore bound to transmit, for all persons, messages presented to them for that purpose, they are not common carriers in the strict sense of the term. They do not insure absolutely the safe and accurate transmission of messages as against all contingencies, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and for any failure in such care and diligence they become responsible."

And in Primrose v. Western Union Co., 154 U. S. 1, 14, 14 Sup. Ct. 1098, 1101, 38 L. Ed. 883 (1894), Gray, J., said: "The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. But telegraph companies are not bailees in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company."

A *sleeping car company* is neither a carrier nor an innkeeper. Pullman, etc., Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902 (1893). It does not undertake that its cars will run to destination. Calhoun v. Pullman, etc., Co. (C. C.) 149 Fed. 546 (1906). But it does undertake that they usually do so run. Pullman, etc., Co. v. King, 99 Fed. 880, 39 C. C. A. 573 (1900). As to its duty to protect its passengers, see post, p. 82, note.

## CHAPTER IV

## WHAT IS A COMMON CARRIER

PARKER, C. J., in DWIGHT v. BREWSTER, 1 Pick. (Mass.) 50, 11 Am. Dec. 133 (1822): On the second count, which charges the defendants as common carriers, we think the facts proved are sufficient to constitute them such. Packages were usually taken in the stagecoach for transportation; large packages were entered in the book kept for the proprietors, and compensation taken for their use. That the principal business was to carry the mail and passengers is no reason why the proprietors should not be common carriers of merchandise, etc. A common carrier is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place. This may be carried on at the same time with other business. The instruction of the judge in this particular, that the practice of taking parcels for hire, to be conveyed in the stagecoach, constituted the defendants common carriers, we think was right.

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### BELL v. PIDGEON.

(District Court, E. D. New York, 1881. 5 Fed. R. 634.)

In Admiralty.

BENEDICT, J.[1] This action is brought to recover the value of a quantity of chalk lost while being transported through the East River upon a vessel called Scow No. 1, owned by the defendant. The occupation of the defendant is that of a dock and bridge builder. In his business he had occasion to transport dirt and stones, and for that purpose he owned and used several scows—flats constructed solely to carry rough matter upon their decks, and moved by means of tugs. The defendant employed these scows for the most part in his own business, but he sometimes chartered a scow to other parties by the day or the month. He was not in the carrying trade, and was not in the habit of transporting any cargo except his own. His scows, when employed by him, were used solely to transport his own articles in his own business; when chartered to others, any transporting done by means of them was done at the expense of the charterer.

In the present instance the libelant applied to the defendant to carry for him a quantity of chalk from alongside the ship Ruby, in the North River, to Newtown creek, at so much per ton. The employment was

[1] Parts of the opinion are omitted.

accepted, and, in pursuance thereof, about 200 tons of chalk were thereafter laden on Scow No. 1 to be transported on the deck thereof through the East River to Newtown creek. The method of loading the chalk upon deck was in accordance with the understanding of the parties, and no fault is shown either in regard to the quantity of chalk taken on board the scow, or in regard to the method of stowing it. When loaded the scow was taken in tow by a tug belonging to the defendant, and proceeded on her way to Newtown creek. While passing up the river three large sound steamers were met about off Grand street, coming down the stream nearly abreast. The tug, with the scow upon a hawser astern, was about in the middle of the river, going at half speed. As the steamers approached, the tug blew her whistle several times, and when they came nearer the pilot waved his hat to call their attention; he also stopped his engine. One of the steamers passed the scow to port, and two on the starboard. On passing they went so near and at such speed as to create a swell, which broke over the scow and caused her to roll so that she dumped all the chalk into the river. There was room for the steamers to have passed at a greater distance, and they might have reduced their speed, in either of which cases the swell would not have been dangerous. * * *

As no negligence on the part of the defendant or his agents has been shown, the damage in question might no doubt be held to have arisen from a peril of the seas, within the meaning of the ordinary exception of a bill of lading. But the defendant's contract contained no exception. It was an unqualified contract to transport and deliver; and, if it was made by the defendant in the capacity of a common carrier, his responsibility was that which the law, upon grounds of public policy, has attached to every common carrier, namely, that of an insurer against all loss or damage, unless caused by act of God or of the public enemy.

The decision of the case turns, therefore, as I view it, upon the question whether the defendant was transporting this chalk in the capacity of a common carrier. "To constitute one a common carrier, he must make that a regular and constant business; or, at all events, he must for the time hold himself ready to carry for all persons indefinitely who choose to employ him." Redfield on Carriers, 15. * * * In the present case the defendant did not hold himself out as ready to transport the goods of others. The proof is that he did no more than to use his scows in his own business, or to let them to others to be used in their business.

Upon the facts of this case, I am, therefore, of the opinion that the defendant's occupation was not that of a common carrier, and that his relation to the chalk in question was simply that of bailee for hire. This being so, in the absence of negligence he is not liable for the loss in question, unless it be also held here, as was held in Nugent v. Smith, 3 Asp. M. L. C. 87, L. R. 1 C. P. D. 19, 26–33, that every shipowner who carries goods on board his ship for hire, is, in the absence of ex-

press stipulation to the contrary, by reason of his acceptance of the goods, liable as an insurer, except as against the act of God or the public enemy.

The same position was taken by Brett, J., in the Liver Alkali Works v. Johnson, 2 Asp. M. L. C. 337, L. R. 9 Ex. 338, 344, but it does not seem to have been the opinion of the court in that case; and upon the appeal in Nugent v. Smith it was distinctly, and I think successfully, challenged by the Chief Justice. 3 Asp. M. L. C. 198, L. R. 1 C. P. D. 423, 427–434. No American case that I know of has so extended the rule applicable to common carriers; and I think it will be found impossible to apply so rigorous a rule to the transportation business of this country.[2]

Upon these grounds I am of opinion that the libel must be dismissed.

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## INGATE v. CHRISTIE.

**(Court of Queen's Bench, 1850. 3 Carr. & K. 61.)**

At nisi prius.

Assumpsit. The declaration stated, that the defendant agreed to carry 100 cases of figs from a wharf to a ship, and that by the negligence of the defendant's servants the figs were lost. Plea: Non assumpsit.

It was proved that, on the 14th of February, 1850, the defendant was employed by the plaintiffs, who are merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames street, to the Magnet steamer, which lay in the River Thames, and that as the figs were on board the lighter, which was proceeding with them to the Magnet, the lighter was run down by the Menai steamer and the figs all lost. It was proved that the defendant had a counting house with his name and the word "lighterman" on the doorposts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him, and that the defendant was a lighterman and not a wharfinger.

ALDERSON, B. Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a

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[2] Acc. Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020 (1857), semble; Gage v. Tirrell, 9 Allen (Mass.) 299, 309 (1864), semble; Allen v. Sackrider, 37 N. Y. 341 (1867); Sumner v. Caswell (D. C.) 20 Fed. 249 (1884), semble; The Dan (D. C.) 40 Fed. 691 (1889). But see Molloy, De Jure Maritimo, bk. II, c. 2, §§ 2, 8; Carver, Carriage by Sea, §§ 4, 5; 2 Select Pleas in the Court of Admiralty, lxxxi; Morse v. Slue, post, p. 313; Boucher v. Lawson, Lee's Hardwicke, 194, 199 (1735); Baxter's Leather Co. v. Royal Mail Co., [1908] 2 K. B. 626; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515 (1835); Moss v. Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1 (1871). And compare The Commander in Chief, 1 Wall. 43, 51, 17 L. Ed. 609 (1863); McClure v. Hammond, 1 Bay (S. C.) 99, 1 Am. Dec. 598 (1790).

man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting house, "lighterman" painted at his door, and he offers to carry for every one.

Wise, for the defendant: Does your Lordship think that the defendant is a common carrier? * * * In the case of Brind v. Dale, 8 C. & P. 207, Lord Abinger, C. B., intimated that in his opinion a town carman was not a common carrier, although he took chance jobs from any one, much as a lighterman does; and so in the case of Ross v. Hill, 2 C. B. 877, the Court of Common Pleas considered that a cab owner was not a common carrier; and from the case of Coggs v. Bernard, 2 Ld. Raymond, 909 [post, p. 317], and the older authorities, it appears that a common carrier is one who carries goods from one town to another. * * *

ALDERSON, B. * * * There may be cases on all sides, but I will adhere to principle if I can. If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in harbor, he is a common carrier, and if the defendant is a common carrier he is liable here. There must be a verdict for the plaintiff.

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## FAUCHER v. WILSON.

**(Supreme Court of New Hampshire, 1895. 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.)**

Case against the defendant as a common carrier of goods, for the loss of a hogshead of molasses. Facts found by the court.

The defendant was engaged in the business of trucking goods for hire from the railway freight station in Manchester to different stores in the city. On one of the warmest days in the summer of 1891, he transported a hogshead of molasses from the freight station to the plaintiff's store, on Elm street, a distance of a little over half a mile. By reason of the fermentation of the molasses, the hogshead burst while being unloaded. The plaintiff's loss was not caused by any want of ordinary care on the part of the defendant. Each party moved for judgment in his favor.

CHASE, J. It is not found that the defendant was a common carrier. The finding that he was engaged in the business of trucking goods for hire from the railway freight station to different stores in the city lacks the distinguishing characteristic of a common carrier, namely, the holding of oneself out as ready "to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow." [Citing authorities.] The inference from this finding is as strong, to say the least, that the defendant's business was limited to trucking for par-

ticular customers at prices fixed in each case by special contract, as it is that he held himself out as ready to truck for the public indiscriminately, at reasonable prices. If such was the character of his business, he was not an insurer of the plaintiff's goods (there being no special contract of insurance), and was only bound to exercise ordinary care in respect to them.

If the defendant was a common carrier, he is not liable for the plaintiff's loss, since it happened from the operation of natural laws, which a common carrier does not insure against.[3] [Citing authorities.] In Farrar v. Adams, 1 Bull. N. P. 69, it is said that "if an action were brought against a carrier for negligently driving his cart, so that a pipe of wine was burst, and was lost, it would be good evidence for the defendant that the wine was upon the ferment, and, when the pipe burst, he was driving gently." It being found that the plaintiff's loss was not due to any want of ordinary care on the part of the defendant, there must be judgment for the defendant.[4]

[3] For this subject, see post, p. 358 et seq.

[4] Acc. Bassett v. Aberdeen, etc., Co., 120 Ky. 728, 88 S. W. 318 (1905); Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435 (1879). See, also, Meisner v. Detroit Co., 154 Mich. 545, 118 N. W. 14, 19 L. R. A. (N. S.) 872 (1908), steamboat company carrying passengers to its amusement park.

In Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 37, 52 N. E. 665, 666, 70 Am. St. Rep. 432 (1899), O'Brien, J., said: "The defendants advertised themselves as general truckmen, their particular specialty being the moving of heavy machinery. They kept and maintained for this purpose a large number of trucks and horses, and the necessary help for the prosecution of this business. On this state of facts there was no legal error in the refusal of the learned trial judge to instruct the jury that the defendants were not common carriers. Truckmen, wagoners, cartmen, and porters, who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying. Where a person whose principal pursuit is farming solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him. The circumstance that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed, and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him; and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."

Compare Farley v Lavary, ante, p. 31, and cases cited in note thereto. See, also, Gordon v. Hutchinson, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464 (1841); Samms v. Stewart, 20 Ohio, 69, 55 Am. Dec. 445 (1851); Fish v. Clark, 49 N. Y. 122 (1872); Hastings Ex. Co. v. Chicago, 135 Ill. App. 268 (1907).

Though a shipowner makes it his business to carry cargoes for the best freights he can obtain, and uses his vessel for no other purpose, he is not necessarily a common carrier. See Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020 (1857); The Dan (D. C.) 40 Fed. 691 (1889); Liver Alkali Co. v. Johnson, L. R. 7 Ex. 267 (1874). Compare Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080 (1906); Hill v. Scott, [1895] 2 Q. B. 371.

In Nugent v. Smith, L. R. 1 C. P. D. 19, 28 (1875), Brett, J., said: "A shipowner who puts his ship into a broker's hands to procure a charter does not hold himself out to carry for the first person who offers. Neither does a mas-

## HARRINGTON v. McSHANE

**(Supreme Court of Pennsylvania, 1834. 2 Watts, 443, 27 Am. Dec. 289.)**

Writ of error. The trial court charged the jury that if they believed the evidence the defendants were liable. Defendants assign this instruction as error.

SERGEANT, J.[5] It appears by the evidence that it is the usage on the Western waters for steamboat owners, in addition to the business of carrying goods, to act as factors, to make sales and returns, without being paid any other consideration than the freight, and that the defendants, by their agent Hyatt, who was also part owner in the boat, received the plaintiff's flour to transport to Louisville and sell, in consideration of being paid a certain freight per barrel. The flour was taken there and sold, and the money which it produced was in the boat on its return up the river, separated from other moneys, and was destroyed by a fire which consumed the boat and its contents. This fire was the result of accident, without any neglect of the defendants or the master and crew; the latter having used every possible exertion to rescue the money from the flames. * * *

The question of the defendant's responsibility in the present case depends on the character in which they held the money when the loss occurred. If they were merely factors, they are not responsible; if they were carriers, the reverse must be the case. Had the flour been lost on the descending voyage by a similar accident, there could be no doubt whatever of the defendants' liability; they were certainly transporting it in the character of carriers. On their arrival at the port of destination and landing the flour there, this character ceased and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys

ter who in a foreign port advertises that he is ready to enter into charters. The shipowner or master has a right to consider the credit and responsibility of the proposed charterer, and to reject his proposal if it be thought expedient. One who puts up his ship as a general ship does, by so doing, by the ordinary understanding of shipowners and merchants, hold himself out as ready to carry all reasonable goods brought to him. And so does a shipowner who runs a line of ships from ports to ports, habitually carrying all goods brought to him."

In Steele v. McTyer, 31 Ala. 667, 674, 70 Am. Dec. 516 (1858), there was evidence that the flatboats in which cotton was carried down the river to market were broken up for lumber at the end of a single trip. Walker, J., said: "If the appellants built or procured a flatboat, with which to carry cotton down the Cahaba river and thence to Mobile, though only for a single trip, and held themselves out as ready and willing to carry cotton on their boat for the people generally who wished to send their cotton to Mobile, then they would be common carriers. * * * If the appellants, having engaged a part of the loading for the boat, held themselves out as ready to carry for any person or persons to the extent of the remaining capacity of the boat, then they would be liable as common carriers to such persons as availed themselves of such offer of their services to the public generally as carriers. These questions, under the proof, should have been left to the jury."

[5] The statement of facts has been rewritten, and part of the opinion omitted.

in the defendants' hands and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier reattached. The return of the proceeds by the same vessel is within the scope of the receipt and of the usage of trade as proved, and the freight paid may be deemed to have been fixed with a view to the whole course of the trade, embracing a reward for all the duties of transportation, sale and return.

If the defendants, instead of bringing the money home in their own vessel, had sent it on freight by another, there would have been to the plaintiffs the responsibility of a carrier, and there ought not to be less if they chose to bring it themselves. If they had mixed the money up with their own, they would have no excuse for nonpayment. The defendants can be relieved from responsibility only by holding that the character of carrier never existed between these parties at all, or that, if it existed on the descending voyage, it ceased at its termination, and that of factor began and continued during the ascending voyage. But if the defendants bring back in the same vessel other property, the proceeds of the shipment, whether specific money or goods, they do so as carriers, and not merely as factors. See Story on Bailm. 350.

In the cases of Kemp v. Coughtry, 11 Johns. (N. Y.) 107, and Emery v. Hersey, 4 Greenl. (Me.) 407, 16 Am. Dec. 268, the points involved in the present case were discussed, and received the same determination.

Judgment affirmed.

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## HONEYMAN v. OREGON & C. R. CO.

**(Supreme Court of Oregon, 1886. 13 Or. 352, 10 Pac. 628, 57 Am. Rep. 20.)**

LORD, J.[6] This is an action brought by the plaintiff against the defendant as a common carrier to recover damages for the alleged killing of a dog delivered to the defendant to be transported by its railway from Portland to North Yamhill. * * * Issue being taken by the reply, a jury was impaneled and sworn, and, after hearing the evidence of the plaintiff, the defendant moved the court for a nonsuit upon the ground that the plaintiff had failed to prove a cause sufficient to be submitted to the jury. The motion for nonsuit was allowed, and judgment was rendered against the plaintiff, from which this appeal was taken. * * *

The evidence submitted and included in the bill of exceptions does not prove the duty or undertaking as alleged. The facts disclose that the defendant did not hold itself out as a common carrier of dogs, or assume their transportation in that character, but that the defendant expressly refused to accept hire and furnish tickets for their trans-

[6] Parts of the opinion are omitted.

portation. The evidence shows that when the party having in charge the dogs applied to the ticket agent of the defendant for transportation for himself and dogs the agent refused tickets for the dogs, and referred him to the baggage master, who told him, "You know the rules about dogs;" but, as an accommodation, consented to take the dogs in his car, and promised to look after them, for which he received two dollars. These circumstances do not show that it was the business of the defendant to carry dogs, or to receive pay for their transportation, but that, as a matter of accommodation to a passenger, it permitted the baggage master, after the party was notified of the rules, to carry them in his car, and to accept pay for his care of them.

It is true, as Mr. Justice Bradley said: "A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry." Railroad Co. v. Lockwood, 17 Wall. 357 [post, pp. 445, 446]. Even in this view, if the arrangement, under the circumstances, made with the baggage master, may be construed to have any binding effect upon the defendant, the defendant can only be charged as a private carrier, or bailee, who undertook to carry what the facts show was not its business to carry, as a matter of accommodation, under a special arrangement. In such a case, as Isham, J., said, "the relation is changed from a common carrier to a private carrier, and when such is the effect of the special agreement, they are not liable as common carriers; neither can they be declared against as such. It is possible there has been a breach of that express contract, and the plaintiff is, perhaps, entitled to damages for the injuries he has sustained; but the action should have been brought on that contract, or for a breach of duty arising out of it, and not on the duty and obligation imposed on common carriers." Kimball v. Rutland R. Co., 26 Vt. 249, 62 Am. Dec. 567.

The complaint must set out the facts of the undertaking or duty as it is. A plaintiff cannot declare upon one undertaking, duty, or obligation, and recover upon another. So that in any view of the facts, as presented by this record, there would seem to be no error, and the judgment must be affirmed.[7]

[7] See, also, Chicago, etc., Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161 (1895), transportation of circus.

# PART II

## THE CARRIER'S UNDERTAKING

### CHAPTER I

### THE CONDUCT OF TRANSPORTATION

#### SECTION 1.—DISPATCH

#### TAYLOR v. GREAT NORTHERN RY. CO.

(Court of Common Pleas, 1866. L. R. 1 C. P. 385.)

Appeal from the county court of Lincolnshire. The action was brought to recover the sum, amongst others, of £4 16s. 6d., for damage sustained by the plaintiff in consequence of a delay in the delivery of three hampers of poultry, which he had sent by the defendants' railway for the early London market. There was no special contract made by the defendants to deliver the goods in time for any particular market. The delay was wholly occasioned by an accident which occurred on the defendants' line between Hitchin and London, to a train of the Midland Railway Company, who have running powers over that portion of the defendants' line. The accident resulted solely from the negligence of the servants of the Midland Railway Company. The county court judge decided in favor of the plaintiff on the ground that as the Midland Railway Company used the said railway by the permission of the defendants, the latter were responsible for delay caused by the negligence of the servants of the former company, and, therefore, that the delivery in this case was not within a reasonable time. The defendants having appealed from this decision,

ERLE, C. J. I am of opinion that our judgment should be for the defendants. I think a common carrier's duty to deliver safely has nothing to do with the time of delivery; that is a matter of contract, and when, as in the present case, there is no express contract there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions. The ground upon which the decision went

against the defendants was that, as the Midland Railway Company used the Great Northern line by the defendants' permission, the defendants were responsible for a delay caused by the Midland Company on their Great Northern line. But in so deciding I think the county court judge took an erroneous view of the relations between the two companies. The legislature have declared by many acts that it is for the public advantage that railway companies should have running powers over each other's lines, and it has specially declared it to be so in the case of the present agreement, which is confirmed by 23 Vict. c. 67. The Midland Railway Company, therefore, were not merely using the line by the defendants' permission but were exercising a statutory right, and the defendants were not responsible for their acts.

BYLES, J. I am of the same opinion. The first duty of a common carrier is to carry the goods safely, and the second to deliver them, and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by law in the contract to deliver; as Tindal, C. J., puts it, when he says, "the duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally." Raphael v. Pickford, 5 M. & G., at page 558.

My Brother HAYES treats ordinary and reasonable time as meaning the same thing, but I think reasonable time means a reasonable time looking at all the circumstances of the case. The delay in this case was an accident, as far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable.

Judgment for the defendants.[1]

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## THE ELIZA.

(District Court, D. Maine, 1847. 2 Ware, 318, Fed. Cas. No. 4,348.)

This was a libel filed against the schooner Eliza, for the breach of a parol contract for the transportation of a quantity of lumber from the port of Saco to New York. The libel was filed on the 4th of February, and the contract was entered into on the last day of November, or the first of December. The cargo was put on board, December 1st, while the schooner lay at the upper ferry, and she then dropped down to the lower ferry to avoid being detained by the ice, which began to be made in the river. She lay there, without proceeding on her voyage, to the time of the filing of the libel, and in fact continues there to

[1] Keating and Montague Smith, JJ., delivered concurring opinions.

Acc. Conger v. Hudson R. Co., 6 Duer (N. Y.) 375 (1857), post, p. 374; Vicksburg, etc., Co. v. Ragsdale, 46 Miss. 458 (1872); Brown, J., in The Caledonia, 157 U. S. 124, 140–144, 15 Sup. Ct. 537, 39 L. Ed. 644 (1895) and cases cited.

this time, with the cargo on board. The schooner, though a small vessel, was proved to be in a good condition and every way fit for the voyage, though at that season of the year the voyage is one of considerable danger. She is now ready for sea and is said to be about sailing on the voyage. The libel was for damage for not proceeding on the voyage within a reasonable time.

WARE, District Judge.[2] The fact, that a contract of affreightment was made and the cargo taken on board in pursuance of the contract is admitted. The controversy is, what were the terms of the contract? The libellant contends that it was a contract in the ordinary and usual terms of such engagements, to receive the cargo on board and to proceed on the voyage without unnecessary delay. The owners allege that it was conditional; that it was to receive the cargo on board where the schooner lay, and drop down to the lower ferry, and then to proceed on the voyage as soon as a master and crew could be obtained to navigate her; the vessel being small, and the voyage at that season being hazardous, that their engagement to perform the voyage was made subject to the condition that a master and crew could be obtained, and that they have made all reasonable efforts to procure a master and have not been able to succeed. It is proved that they applied to several masters to take charge of the vessel, who all, for various reasons, declined; but not particularly on account of the dangers of the voyage. * * *

The conclusion to which I am brought by the evidence is, that the contract was not made dependent on a condition that a master and crew could be found, but that it was, as charged in the libel, in the ordinary form, that the vessel should proceed on her voyage without unnecessary delay. It is true that every engagement to perform a future act is, in one sense, conditional. If it becomes impossible by any event not imputable to the party who is bound to perform it, unless he assumes the risk of all contingencies, he is excused. The law compels no one to impossibilities. Poth. Oblig. 148; 6 Toull. 227. Those events called accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition, in every engagement, for a future act. If the vessel had been burnt by an accidental fire, or destroyed by a tempest, this would have been a valid excuse. But the difficulty of obtaining a master and crew is not one of those contingencies implied in a contract of affreightment, to excuse a nonperformance of the contract. It is not unusual for an owner to engage a vessel for a voyage before he has engaged a master, and a crew is rarely engaged until the voyage is determined upon and the vessel nearly ready for sea. These contingencies the owner takes on himself. I do not mean to say that the difficulty of obtaining a master and crew to navigate a vessel may not be such as to amount to an impossibility, and thus come within the class of fortuitous events that will excuse

[2] Part of the opinion is omitted.

a party from performing his engagement. But the circumstances must be very extraordinary to amount to a justification. It is proved by the testimony, that the owner made efforts to obtain a master. Five different persons were applied to without success. But others might have been found, if not in Saco, in some of the neighboring towns. And I do not think that any such extreme case is proved, as will excuse the owner from his engagement, under the notion that it has become impossible by a fortuitous event or an accident of major force.

Decree for libelant.[8]

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## ANDERSON v. OWNERS OF THE SAN ROMAN.

(Privy Council, 1873. L. R. 5 P. C. 301.)

MELLISH, L. J. The only question which their Lordships have to determine in this case is whether a German vessel called the San Roman was justified in staying at Valparaiso from the 23d of September, 1870, up to the 23d of December in the same year, on account of the alleged risk of capture in consequence of the war which then existed between France and Germany, this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned judge in the court below has laid down that "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay," and their Lordships are of opinion that that is a correct statement of the law of England. It has been admitted in the argument of the appellants that it is unnecessary to determine whether this case ought to be decided according to the law of England or according to the law of Germany, because there is no practical distinction on the subject in the law of the two countries.

Therefore the question their Lordships have to determine is entirely a question of fact, namely, whether the German master had during that time such an apprehension of capture founded on circumstances calculated to affect his mind—he being a man of ordinary courage, judgment, and experience—as would justify delay; and their Lordships agree with the learned judge in the court below that there was a sufficient risk of capture to justify this delay.

This is not a case where the master has refused to perform the

[8] "Knowing the difficulty of transportation, being informed of a then existing press of business, aware of the probability of an inability to promptly handle and transport freight, a carrier cannot accept and receipt for freight for transportation, and then plead in excuse and extenuation of its delay a condition of affairs of which it was at the time advised." Truly, J., in Yazoo & M. V. R. Co. v. Blum Co., 88 Miss. 180, 40 South. 748, 10 L. R. A. (N. S.) 432 (1906). Acc. Railroad Co. v. Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297 (1872).

contract at all. No doubt, if the voyage had been abandoned, then it would have been necessary to shew that he had been actually prevented from performing it; but this is merely a question whether there was a reasonable cause for delay.

The evidence on the subject really is that it was reported at Valparaiso, and generally known, that French vessels of war were continually, during the months, at any rate, of September and October, and for a part of November, sailing in and out of the harbor of Valparaiso, Valparaiso being the great harbor on that coast; and if French vessels intended to capture German vessels, they were more likely to find prizes coming out of Valparaiso than from any other harbor on the coast. There is one particular ship that seems to have come in and gone out, and in ten days more to have come in again. It appears to their Lordships that the German captain in Valparaiso could come to no other reasonable conclusion than that the principal object of these French war vessels, of which at one time there were as many as five in Valparaiso, must have been to capture German vessels.

Besides that, it appears that the newspapers at Valparaiso published reports, correct or incorrect, of captures that had actually taken place; and, in addition to that, it appears that the master went and consulted the consul of his own nation, and the consul advised him, in the strongest language—in fact, almost ordered him—not to go, and told him that, if he would go, he must give him a certificate that he had received due warning against leaving Valparaiso. There were other German ships in that harbor, some loaded and some unloaded, and the captains of all of them came to the conclusion that it would be improper and unsafe to leave Valparaiso at that time.

It also appears that the master was far from being a person who waited to the last to leave when the French vessels had for a time departed, but that he was among the first who went to the consul and required his papers for the purpose of leaving. Therefore there is nothing to show that he was at all neglecting or wishing to violate his duty towards the owners of the cargo. Their Lordships agree with what was said before in the judgment in the case of The Teutonia, L. R. 4 P. C. 171,[4] that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will

[4] In this case Lord Justice Mellish said: "* * * If the cargo had been a Prussian cargo, it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that, when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because, from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

run greater risk in their defense, than he would with respect to goods of his own nation. If their Lordships were to look upon this case as a case in which the cargo was German as well as the ship, or a case in which both ship and cargo belonged to the same person, and then were to ask the question, Would a man of reasonable prudence, under such circumstances, have set sail or waited? it appears to their Lordships most clearly that a man of reasonable prudence would have waited.

Then, when it is remembered that the owner of the cargo is an Englishman, it must be a matter of mere guess whether the cargo would have arrived in England sooner than it did if it had started before, because, in the first place, there would be great risk of capture; and secondly, whether the vessel were captured or not, the German ship, during the whole of that voyage from Valparaiso to Cork or Falmouth, and then from Cork or Falmouth to its port of discharge, would have been justified in taking reasonable precautions to avoid French vessels. Then, if the ship were captured, nobody could tell how long it would have been kept before it was sent to France for the purpose of being condemned, or how long it would have taken before the cargo arrived. Therefore it is by no means certain that if the master had gone to sea before he did the cargo would have arrived any sooner.

Then, with regard to the last part of the delay—that after the 13th of November—nobody could tell for a time whether the last French vessel would come back, or whether it was cruising about. The delay between the 11th and the 23d of December is too short a delay to be a matter of any importance, yet that appears to be accounted for by his being engaged in procuring money to pay his expenses.

On the whole, their Lordships are of opinion that the judgment of the court below is perfectly right, and they will humbly advise Her Majesty that this appeal ought to be dismissed with costs.

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## SECTION 2.—CONTINUITY

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### LOUISVILLE & N. R. CO. v. KLYMAN.

(Supreme Court of Tennessee, 1902. 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755.)

CALDWELL, J.[8] The line of the Henderson Division of the Louisville & Nashville Railroad Company, running north and south, crosses the line of its Memphis Division, which runs east and west, at Guthrie, Ky. Russellville, Ky., is on the former line, east of the intersection; and Nashville, Tenn., is on the latter line, south of the inter-

[8] Parts of the opinion have been omitted.

section. Passengers going from one of these points to the other must change cars and have some delay at Guthrie, the place of intersection. August 10, 1898, the plaintiff, Solomon Klyman, took passage at Russellville for Nashville; and, while awaiting the Nashville bound train at Guthrie, he received a message calling him in the opposite direction, to Madisonville, Ky., whence he went to Louisville, Ky., and thence to Russellville, and on to Guthrie again by the same route as before. After this, on August 29th of same year, he boarded the train at Guthrie and resumed his journey to Nashville. The conductor challenged his ticket, and, upon his refusal to pay fare, stopped the train, and was in the act of forcibly ejecting him, when a fellow passenger paid his fare for him, and he was carried safely to his destination. A few moments after his fare was paid he exhibited a large amount of money, and repaid the gentleman who had kindly advanced the fare for him. This suit was brought to recover damages for the attempted ejection; verdict and judgment were rendered for $150 in the plaintiff's favor, and the defendant appealed in error.

The trial judge took the plaintiff's view, and charged the jury as follows: "That if the plaintiff purchased a ticket at Guthrie for Nashville, and paid full fare for it, or if he purchased it at Russellville for Nashville, via Guthrie, as the road ran, at the full fare, that he was entitled to transportation from Russellville or from Guthrie to Nashville upon the same, no matter when presented; and if the defendant company, through its conductor, refused to accept the same for passage from Guthrie to Nashville when offered and presented by plaintiff and the conductor thereupon proceeded to eject, or attempted to eject, the plaintiff from the train, such action on his part was contrary to law, and that defendant would be liable for such."

This instruction, when applied, as it must be, to the facts and contentions heretofore recited, is erroneous in its alternative supposition. The ticket was not good for transportation to Nashville when presented, if issued in ordinary form at Russellville, and used to Guthrie 19 days previously. Such a ticket, if issued, was good only for a continuous passage from Russellville to Nashville by such connection as was made by the company's trains at Guthrie; and the plaintiff, having elected, if he did, to begin his journey on the day of issuance, was legally bound to finish it by the first suitable train from Guthrie after his arrival there. The contract indicated by such a ticket was, in the absence of an agreement to the contrary, an entirety; and, when performance was once commenced, both passenger and carrier were legally obliged to continue it until completed. The contract operated on both alike. It gave the passenger no more power to break his journey into parts against the company's will than it gave the company to do the same thing against his will. It gave neither the right of severance and piecemeal performance without the consent of the other, and no consent is shown or claimed.

The purchase of a full-rate, through ticket from Russellville to Nashville, if made by the plaintiff, entitled him, under the authority of Railroad Co. v. Turner, 100 Tenn. 214, 47 S. W. 223, to elect when he would begin his journey; but it did not entitle him, under that or any other authority of which we are aware, to subdivide his journey at will, or, when started, to go otherwise than continuously from initial point to ultimate destination. The law implies the right of an election between times for embarkation from the very sale of such a ticket; and it likewise, for a similar reason, implies the duty of continuous passage, from the very fact of its commencement. As the sale of such a ticket, nothing else being said, affords an inference that the purchaser may start when he pleases, so his starting, without an agreement to the contrary, affords an inference that he will go directly to the end of his journey. The company must receive him upon its regular train whenever he sees fit to start, and, having started, he must make a continuous passage; no agreement to the contrary having been made in either instance. These rights and duties lie at the foundation of the contract, and are reciprocal.

Only a few of the many authorities upon the subject will be cited. * * * It is due to say that we are not dealing in this case with a coupon ticket, in respect of which, as a whole, the rule is different; allowing, as it does, as many breaches in the journey, or as many stop-overs, as there are coupons. Of such a ticket, each coupon is said to stand as a separate ticket between its own initial and ultimate points; and passage upon any particular coupon, when begun, is required to continue to its end, unless otherwise agreed. The authorities upon the use of the coupon ticket illustrate and re-enforce the doctrine herein applied to the case in hand. * * *

Reverse and remand.[6]

[6] Acc. Cheney v. B. & M. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190 (1846); State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671 (1854); Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457 (1860); Stone v. Chicago, etc., R. Co., 47 Iowa, 82, 29 Am. Rep. 458 (1877); Pa. R. Co. v. Parry, 55 N. J. Law, 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. Rep. 654 (1893), changing, en route, to faster train; Ashton v. Lancashire, etc., Ry. Co., [1904] 2 K. B. 313; Bastable v. Metcalfe, [1906] 2 K. B. 288. A passenger who can get no seat may, it seems, leave the train at the next station without paying fare, but if he gets a seat at such station he is not entitled to ride further, except on paying fare from the starting point. Davis v. Kan. City, etc., Ry. Co., 53 Mo. 317, 14 Am. Rep. 457 (1873). A passenger ejected for not paying fare may not resume his journey on paying fare for the rest of the way. Pennington v. Phil., etc., R. Co., 62 Md. 95 (1883). Compare Choctaw, O. & G. R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963 (1903), where employé, ordered to leave train for disobeying orders, was held entitled to travel as passenger on paying fare for the rest of the way. And see cases collected in 28 L. R. A. 773, note; Beale & Wyman, R. R. Rate Reg. §§ 671–680.

Where a through fare is greater than the sum of the local fares, it has been held that a common carrier is not obliged to receive separate local fares in payment for through transportation. Gt. No. Ry. Co. v. Palmer, [1895] 1 Q. B. 862; London & N. W. Ry. Co. v. Hinchcliffe, [1903] 2 K. B. 32. Contra, Kan. City So. Ry. Co. v. Brooks, 84 Ark. 233, 105 S. W. 93 (1907).

## LASKER v. THIRD AVE. R. CO.

(City Court of New York, General Term, 1899. 27 Misc. Rep. 824, 57 N. Y. Supp. 395.)

McCARTHY, J. The plaintiff voluntarily took passage in one of the open cars of the defendant. Subsequently, because of a cold, and of the sudden change in the weather, the plaintiff left said first car, and boarded a closed car—one immediately in the rear of the same, and attached thereto. The conductor of the latter car then demanded from plaintiff his fare, which plaintiff refused, for the reason that he had already paid a fare to the conductor in charge of the first, or open, car. Because of this refusal he was ejected from the last car; hence this action.

The demand of the conductor in charge of the closed car for plaintiff's fare was just and reasonable. The plaintiff had voluntarily chosen to take passage in the open car. If, for reasons satisfactory to himself, and for his own interest, he subsequently wished to take passage in one of defendant's closed cars, he thus made himself a new passenger, and defendant has the right to require him to pay the usual fare. The refusal of plaintiff to pay said fare entitled defendant's servant to use necessary physical force to eject plaintiff from the car. In our judgment no unnecessary force or violence was used. Finding there was no error, judgment is affirmed, with costs.[7]

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## SECTION 3.—ROUTE

CONSULATE OF THE SEA, c. 56: "Further the managing owner of the ship or vessel cannot and ought not to enter into a port without the assent of the merchant, and if he has entered when the merchant is afraid of something, all the damage which the merchant incurs the ship is bound to make good, and the ship's clerk ought to make an entry of it, whether or not the ship be moored to the shore. But nevertheless, if the managing owner of the ship is in want of any necessaries, he ought to tell the merchant that he cannot navigate the vessel because he requires new apparel or to repair or to careen his vessel, and thereupon the merchant ought to enter the port, provided that the mate and mariners affirm their knowledge of the fact by their oaths. * * *"[8]

[7] Compare Birmingham, etc., Co. v. McDonough, post, p. 553.

[8] The Consulate of the Sea "was probably a compilation made by private persons; but whoever may have been the authors of it, and at whatever precise point of time the Consolato may have been compiled, it is certain that it became the common law of all the commercial powers of Europe. The

LAWS OF WISBY, art. LIII: "If a ship freighted for one port, enters another, the master, together with two or three of his chief mariners, ought to clear themselves upon oath, that it was by constraint and necessity that they went out of their way. * * *"*

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MOLLOY, DE JURE MARITIMO, bk. II, c. IV, § 10 (1676): "If the ship puts into any other port than what she was freighted to, the Master shall answer Damage to the Merchant; but if forced in by Storm or by Enemy, or Pirates, he then must sail to the Port conditioned at his own Costs."

marine laws of Italy, Spain, France, and England were greatly affected by its influence; and it formed the basis of subsequent maritime ordinances. * * * It is undoubtedly the most authentic and venerable monument extant of the commercial usages of the Middle Ages, and especially among the peoples who were concerned in the various branches of the Mediterranean trade." 3 Kent, Commentaries, 10, 11.

"It is not too bold a conjecture to suppose from the circumstance that explanations are for the most part given at the end of each chapter of the reasons for which 'the chapter was made,' or of the object principally kept in view when the chapter was drawn up, that the 'Customs of the Sea,' in the form in which they have come down to us in the Book of the Consulate of 1494, are a digest of the constitutions made from time to time on maritime matters by the Prud'hommes of the Sea at Barcelona. Their true character is avowed in the opening words of the first chapter: 'These are the good constitutions and good customs in matters of the sea which the wise men who have navigated the world have handed down to our ancestors, and which make up the book of the Science of Good Customs.' That there were written 'customs of the sea', which the Consuls of the Sea were authorized to observe at a period long antecedent to the Barcelonese ordinance of 1435, may be inferred from certain passages in the Valencian regulations, which, as already observed, were drawn up between A. D. 1336 and A. D. 1343. A provision is found in chapter xii of those regulations to this effect: 'The sentences of the consuls and the decisions of the judges shall be rendered in conformity with the written customs of the sea, according as it is declared in the different chapters of them, and in case where the customs of the sea shall declare nothing, according to the counsel of the prud'hommes of the sea.' And it had been already provided by a previous diploma of Peter III of Aragon, by which the consular jurisdiction was first established in Valencia in 1283, that the Consuls of the Sea should determine all contracts and disputes between 'men of the sea' and mariners, according to the custom of the sea, as had been customary at Barcelona." Sir Travers Twiss, Black Book of the Admiralty, vol. II, p. lxv.

* "The opinion that the Sea Laws, which form the first division of the so-called Maritime Law of Wisbuy, are the oldest Sea Laws of Wisbuy, and that the second and third divisions (articles 40 et seq.) of that collection of Sea Laws are of Flemish and Dutch origin respectively, which were introduced at Wisbuy and in other ports of the Baltic in the fourteenth century, whilst the first division had been adopted in the thirteenth century at Wisbuy itself in the common assembly of the associated Shipmasters and Merchants of Wisbuy and of Lubec, is far more reasonable than the popular opinion." Sir Travers Twiss, Black Book of the Admiralty, vol. IV, p. lxxiv.

"This general reception of the Wisbuy Sea Laws can only be attributed to the fact that they were regarded as bringing together in a very trustworthy form the ancient usages and customs of the merchants and mariners of the Northern and of the Western Seas. Id. p. lxxxvi.

## LEDUC & CO. v. WARD.

(Court of Appeal, 1888. 20 Q. B. D. 475.)

Appeal by the defendants from the judgment of Denman, J., at the trial without a jury.

The action was by indorsees of bill of lading against shipowners for nondelivery of goods, and the facts were in substance as follows: The plaintiffs had purchased goods from merchants abroad to be shipped from a foreign port. The payment of the price was to be made in exchange for shipping documents, and, the price of the goods having been paid, the bill of lading, signed by the defendants' captain upon the shipment of the goods, had been indorsed to the plaintiffs. The ship was a general ship.

The bill of lading as far as material was as follows: "Shipped in apparent good order and condition on the steamship Austria, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property; 3,123 bags of rape seed, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Dunkirk unto order or assigns." Then followed the usual clause excepting perils of the sea, etc.

The vessel, instead of proceeding direct to Dunkirk, sailed for Glasgow and was lost, with her cargo, near Ailsa Craig, off the mouth of the Clyde, by perils of the sea.[10] * * *

Gainsford Bruce, Q. C., and Lawson Walton (Finlay, Q. C., with them), for the defendants: * * * The liberty given to call at any ports in any order is against the notion that the terms of the bill of lading import a contract for a direct voyage. It would be very absurd that the ship should be able to go to Gibraltar and then back again to some port near Fiume, as she undoubtedly might under this clause, and yet could not go out of her way as far as Glasgow. * * *

[FRY, L. J. On the face of the bill of lading no other enterprise is shown but a voyage from Fiume to Dunkirk. The contention for the defendants must, it would appear, go the length of saying that the ship may go to any port in the world.]

If it be necessary to go that length, that is the natural meaning of the words.

C. Russell, Q. C., and Gorell Barnes, for the plaintiffs: * * * The clause giving liberty to call at any port in any order must be construed as subject to the limitation that they must be ports within

[10] There was evidence that the shippers knew when they shipped the cargo that the vessel was intended to proceed to Glasgow, but the court held that under the Bills of Lading Act such knowledge could not affect the obligation of the carrier toward indorsees of the bills of lading. So much of the statement of facts, of the argument of counsel, and of Lord Esher's opinion as relates to this point has been omitted. Concurring opinions of Fry and of Lopes, L. JJ., have also been omitted.

the scope of the adventure on which the ship by the terms of the bill of lading is engaged. It cannot be that Glasgow, which, to and fro, would be somewhere about 1,200 miles out of the course from Fiume to Dunkirk, is within that liberty.

LORD ESHER, M. R. In this case the plaintiffs, the owners of goods shipped on board the defendants' ship, sue for nondelivery of the goods at Dunkirk in accordance with the terms of the bill of lading. The defense is that the delivery of the goods was prevented by perils of the sea. To that the plaintiffs reply that the goods were not lost by reason of any perils excepted by the bill of lading, because they were lost at a time when the defendants were committing a breach of their contract by deviating from the voyage provided for by the bill of lading. * * *

If the counsel for the defendants was right in his argument that there is no contract for any particular voyage in the bill of lading, just conceive what a state of things, in a business point of view, would result. The object of the carriage of the goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at that place for sale or use there acts upon the assumption that they will arrive there at or about a certain time in the ordinary course of a voyage there from the port of shipment. If the argument for the defendants were correct, he could not tell at what time he could calculate on having them. The indorsee of a bill of lading could not tell when he was likely to receive the goods. Business could not be carried on upon those terms.

Again, with regard to the insurance of goods, similar difficulties would arise. How could the goods be insured, if it was not known for what voyage they were to be insured? To suppose that there is no contract for a particular voyage in the bill of lading seems to me to be to disregard the whole course of mercantile business. It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined; and accordingly it seems to me to be provided for in the bill of lading. The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described?

A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and courts of law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other. So here, if the description of the

voyage had been merely from Fiume to Dunkirk, I think the contract would have been a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk, and any departure from that track in the absence of necessity would be a deviation. Of course when I speak of the ordinary sea track I do not mean an exact line, for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer, again, might be different from that for a sailing vessel; I mean the ordinary track of such a voyage according to a reasonable construction of the term.

In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To "call" at a port is a well-known sea term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order; and therefore the words "in any order" are frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage.

It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply; and therefore the shipowners are responsible for the loss of the goods.[11] * * *

[11] Acc. Glynn v. Margetson, [1893] A. C. 351 (oranges shipped at Malaga for Liverpool "with liberty to proceed and stay at any port or ports in any rotation in the Mediterranean" damaged by delay caused by proceeding to a Mediterranean port out of the course of a voyage to Liverpool).

"On the trial he [plaintiff] produced written evidence of the contract to transport, to wit, the bill of lading. This contract, however, contained no limitation as to the route to be taken by the vessel. It was simply a contract that the barley was to be 'delivered at the port of Baltimore in good order, the dangers of the seas excepted.' This authorized the carrier to take either of several customary and usual routes. Such is the legal effect of the contract. Its effect was the same as if the provision had been inserted in the contract,

## PHELPS, JAMES & CO. v. HILL.

(Court of Appeal. [1891] 1 Q. B. 605.)

Action for failure to deliver according to the contract of carriage a quantity of tin plates shipped by plaintiffs on defendants' vessel at Swansea, to be transported to New York, collision, perils of the sea, and other perils mentioned in the bill of lading excepted. At a trial before a special jury it appeared that the vessel carried cargo for many other shippers, that in consequence of damage received in bad weather at sea the vessel put into Queenstown, that repairs to the vessel were necessary to enable her to continue her voyage, and that after temporary refitting at Queenstown the master, by orders from his owners, but without communication with the owners of cargo, sailed for Bristol for repairs, and that the vessel was sunk in collision shortly before reaching Bristol and the cargo damaged. Repairs might have been made at Swansea, which was on the way from Queenstown to Bristol, and sixty miles nearer than Bristol. The chief reason for going to Bristol was that the ship owners had a yard of their own there, in which the ship could be repaired more cheaply and quickly than anywhere else. The trial judge left to the jury the question whether the master exercised the discretion of a reasonable man in the interest of ship and cargo in going to Bristol instead of Swansea. The jury found that there was no deviation, and judgment was entered for defendants. Plaintiffs moved, on grounds which appear in the opinion, to set aside the verdict and judgment and to enter a judgment for them.

LINDLEY, L. J.[12] The voyage being fixed by the contract of affreightment, it is the duty of the master to proceed to the port of delivery without delay, and without any unnecessary departure from the direct and usual course. But circumstances may arise which render it necessary to depart from this usual course, and tempestuous weather, injuring the ship and rendering it necessary to put into

that the carrier was at liberty to take any customary or usual route, in his discretion." Hunt, C., in White v. Ashton, 51 N. Y. 280 (1873).

"A shipper, who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carrier to select any usual or reasonably direct and safe route by which to forward after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. In such a case, the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have a right to select at his discretion any customary or usual route which was regarded as safe and responsible." Mitchell, J., in Snow v. Indiana B. & W. Ry. Co., 109 Ind. 422, 9 N. E. 702 (1886).

[12] The statement has been rewritten, and the concurring opinions of Lopes and Kay, L. JJ., omitted.

some port of repair, is one of those circumstances. When a ship is thus injured it is the duty of the master to do the best he can for all concerned; but his primary duty being to complete the voyage with as little delay as possible, it follows that his first care ought to be to get his ship repaired as soon as possible, and to resume his voyage as quickly as he can. The same principle may be expressed in other words; e. g., by saying that he ought to go to the nearest port where the necessary repairs can be most quickly done, or by saying that there ought to be no unnecessary departure from the proper course of the voyage and no unnecessary delay in prosecuting it.

But in whatever language the rule is expressed, it must not be so worded as to exclude the element of reasonableness. By "possible" and "necessary" is meant reasonably possible and reasonably necessary, and in considering what is reasonably possible or reasonably necessary every material circumstance must be taken into account—e. g., danger, distance, accommodation, expense, time, and so forth. No one of these can be excluded. Mr. Barnes invited us to exclude the element of expense; but to say that, as a matter of law, expense is to be disregarded, would be to make the rule far too rigid. Suppose there are two ports, both equally safe and accessible, and in all respects proper for repairing the ship; but suppose one is a dear port compared with the other, a reasonable man would naturally and properly choose the cheaper. Suppose the cheaper port to be a little more out of the way than the other, is it reasonable to say that the master must go to the other? I can find no authority for so rigid a rule. All the decisions on the subject of deviation show that what is reasonably necessary is permissible in these cases. See 1 Arn. Ins. (2d Ed.) p. 454; Id. (6th Ed.) p. 502; 1 Phillips' Ins., §§ 1018–1022.

Lord Mansfield said, in Lavabre v. Wilson, 1 Dougl. 291: "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires." But this passage, though often referred to, has never been understood as excluding the element of reasonableness. Moreover, if a master of competent skill and knowledge, and acting bona fide in the interest of all concerned, has chosen one port in preference to another, then although the court or a jury may and ought to take a different view if they come to the conclusion that he ought to have acted differently, they ought not to come to such a conclusion on light grounds. In a nicely balanced case they are fully justified in attaching considerable weight to the master's judgment and in allowing that to turn the scale in their own minds. This is what I understand Mr. Phillips to mean in section 1022 of his well-known book, and what the court laid down in the American case of Turner v. Protection Insurance Co., 25 Me. 515, 43 Am. Dec. 294. In that case the court said: "The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed with safety to a

nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he may err in judgment." That was an action on a policy in which deviation was relied on as a defence. There was no conflict between the cargo owner and the ship owner, as in the case before us. But the same principle is applicable to both classes of cases. Applying this principle to the present case, can we set the verdict of the jury aside? I think not.

Mr. Barnes complained of misdirection on the ground that the learned judge ought to have told the jury that the cargo owners ought to have been communicated with at Queenstown and have been consulted as to what ought to be done. No authority was cited in support of this proposition, and principle and considerations of expediency are against it. Are the cargo owners to be consulted about repairing the ship? That is nothing to them, provided the voyage is duly completed. Are they to be consulted as to what is to be done with the cargo? How is this possible if the ship is a general ship? How is the master to know who the owners of the cargo are? What is he to do if they differ in opinion? To hold that they ought to be consulted would be to impose a new and intolerable burden on the master.

It was also contended that there was misdirection in omitting to tell the jury that no deviation could be justified that was not necessary, and that the judge did not sufficiently explain the importance of this to the jury. But this contention is based on the assumption that what is meant by "necessary" is something much more rigid than what is reasonably necessary in a nautical and commercial sense.

Then it was said that the verdict was against the weight of the evidence; that the evidence showed that the master sacrificed the interests of the cargo owners to the interests of the shipowners; that he acted on their orders and not on his own judgment; that even if he was justified in leaving Queenstown he ought to have put into Swansea, and not Bristol. Having studied the evidence with care, I cannot disagree with the jury. I find it quite impossible to say that twelve men could not have found a verdict for the defendants if they had really understood the evidence. I am satisfied that the master did consider the interests of the cargo owners as well as those of his immediate employers, and that he did bona fide act to the best of his judgment in the matter. It may be that Swansea would have been as good and in some respects a better port to put into than Bristol; but, on the other hand, there was less risk of delay in Bristol, and there were advantages to the shipowners which there was no real reason for sacrificing. These were all matters fairly before the jury, and for them to consider and determine.

In my opinion, it would be wrong to disturb the verdict. It is not

necessary to determine the point raised by the defendants on the clause as to insurance, but I am inclined to think that it has reference to the voyage contracted for, and not to unjustifiable departures from it. The motion is refused with costs.[18]

[18] "It is insisted in the assignment of errors that, under the facts in this case, an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike, and the other, equally good, was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made, and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage. But, where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him. * * * It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire, and their instructions taken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and, failing to do this, the defendant road must be held to be liable for any injury resulting upon the substituted route. It also clearly appears that the freight was not of such perishable nature as to necessitate the immediate transshipment, without notice to plaintiff, to another route, in order to prevent their loss." Wilkes, J., in Louisville & Nashville R. Co. v. Odil, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. Rep. 820 (1896). Acc. Fisher v. Boston & M. R. Co., 99 Me. 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. Rep. 283 (1904).

A carrier is not justified in changing his route merely to avoid delay. Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838), channel obstructed by ice; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54 (1839), locks in canal out of order. Conversely, he may justify a delay, though it might have been avoided by change of route. Broadwell v. Butler, 6 McLean, 296, Fed. Cas. No. 1,910 (1854) waiting thirty days for high water in the Ohio river; Bennett v. Byram, 38 Miss. 20, 75 Am. Dec. 90 (1859), waiting six months for high water. Even though the bill of lading gives the carrier a right to forward by another route, available, but more expensive. Empire Transportation Co. v. Wallace, 68 Pa. 302, 8 Am. Rep. 178 (1871). And in case of disaster to a carrying vessel, the carrier may detain the cargo for repairs to the vessel instead of transshipping it. The Strathdon (D. C.) 89 Fed. 374, 380 (1898).

TRANSHIPMENT.—"A ship departs from Bordeaux or elsewhere; it happens sometimes that she is lost, and they save the most that they can of the wines and the other goods. The merchants and the master are in great dispute, and the merchants claim from the master to have their goods. They may well have them, paying their freight for such part of the voyage as the ship has made, if it pleases the master. And if the master wishes, he may properly repair his ship, if she is in a state to be speedily repaired; and if not, he may hire another ship to complete the voyage, and the master shall have his freight for as much of the cargo as has been saved in any manner. And this is the judgment in this case." The Charter of Oleron of the Judgments of the Sea, art. 4 (eleventh or twelfth century).

"That the Rolls of Oleron were received as law in the maritime courts of England after 12 Edward III is clear from the language of a judgment given by the mayor and bailiffs of the city of Bristol, and certified by them to the Lord Chancellor. In this judgment the law and custom of Oleron (lex et consuetudo de Oleron) are recited as founding the obligation of the master of a ship to protect the cargo from trespass on the part of the crew, and sentence was given in accordance with that law in favor of the plaintiff." Sir Travers Twiss, Black Book of the Admiralty, vol. I, p. lxii.

"The Judgments of the Sea * * * have been accepted as a common maritime law in every country which borders on the Atlantic Ocean or on the North Sea, whilst the kings of Castile gave them the authority of law in

## SECTION 4.—EFFECT OF DEVIATION

CONSULATE OF THE SEA, c. 165: "If a merchant or mariner or any one else, who accepts a commission for a given voyage or to a known place, loses all that which is committed to his charge without any fault on his part, he is not bound to replace anything nor to compensate him who has entrusted him with the commission.[14] But nevertheless, if the said commissioner shall carry the goods committed to his charge upon another voyage or to another place from that which was agreed upon with him who entrusted the commission to him, if the goods entrusted to him are lost, the commissioner is bound to make good everything to him who has entrusted him with the commission, since he has carried the goods to another place and upon another voyage which had not been agreed upon. * * *"

Chapter 166: "If * * * an occasion for reprisals arises, or for an embargo of the authorities, or armed ships of the enemy come there, * * * the commissioners may arrange with the managing owner of the ship or vessel in which they are to go to another place where they have no fear of the circumstances above mentioned; * * * provided it be to preserve the goods * * * and for no other reason, and this should be done without any fraud."

Chapter 167: * * * "And accordingly our predecessors of olden time saw and adjudged that managing owners of ships or vessels who * * * carried commissions from others, ought not to be in a worse condition than another commissioner. * * * Nevertheless, if there be in his ship goods of merchants, and there be no one in charge of them, and the managing owner of the ship has no commission respecting them, further than that he ought to deliver them to

their ports in the Mediterranean, and the trading cities of the Baltic incorporated their provisions into their own maritime law." Id. vol. II, p. xlvii.

"On peut très légitimement attribuer, ainsi que l'ont fait sir Travers Twiss et le professeur hollandais Pols, la paternité de ces jugements de la mer aux juges de la mer d'Oleron, qu'on y voie des sentences rendues dans des procès réels ou des déclarations sur le droit, fruit d'une longue experience, et consignées par ces hommes rompus aux affaires maritimes dans un registre ou sur des rôles pour en perpétuer la mémoire." Desjardins, Introduction Historique à l'étude du Droit Commercial Maritime, p. 33.

CONSULATE OF THE SEA, c. 46: "If a managing owner of a ship or vessel shall be in any place, and shall accept on freight goods of merchants to carry to another place, which place shall have been agreed upon between the said managing owner and the merchants, he is under the necessity of conveying the goods to the place, to which he has agreed with and promised to the merchants to carry them, in his own ship. And if the managing owner of the ship shall put them on board of another ship or vessel without the consent or knowledge of the merchants, although that ship or vessel may be larger or better than his own, if the goods shall be lost or shall be spoilt, or he to whom the

[14] Compare Woodlife's Case, post, p. 312.

some person in the port where he ought to discharge, if the conditions above said exist so that he dare not enter the port, the managing owner of the ship or vessel ought not to carry them afterwards to another port, since he has no commission to enable him to sell them, consequently he ought to restore them to those merchants who delivered them to him. And if the managing owner of the ship or vessel carries them to another port, and the goods are lost, the managing owner of the ship or vessel is bound to replace and make good the whole of them."

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## DAVIS v. GARRETT.

**(Court of Common Pleas, Trinity Term, 1830. 6 Bing. 716.)**

The declaration stated that plaintiff at the special instance and request of defendant delivered to defendant on board the vessel Safety, and defendant received, a certain quantity of lime to be carried upon said vessel from Bewly Cliff to Regent's Canal, the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation excepted, for certain reasonable reward; that the vessel sailed on the intended voyage with the lime on board, and that it then became the duty of the defendant to carry said lime to Regent's Canal, the perils above mentioned excepted, by the direct, usual and customary way, course and passage, without any voluntary and unnecessary deviation or departure from or delay or hindrance in the same, but that defendant, though not prevented by any of the excepted matters, did not so carry the lime, but by John Town, his master and agent, without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed and navigated the vessel from and out of such usual and customary course, to wit to East Swade and to Whitstable Bay, and delayed the vessel for twenty four hours, and that by reason of such deviation and delay she was out of her course and was exposed to a great storm, and thereby wrecked and the lime destroyed to plaintiff's damage.

At the trial before Tindal, C. J., it appeared that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire; and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

goods belong shall sustain any loss or incur any expense, the managing owner of the ship is bound to make compensation for the goods which shall be lost, and all the interest which he to whom the goods belong may have incurred, and he shall be believed on his oath."

A verdict having been found for the plaintiff,

Taddy, Serjt., obtained a rule nisi for a new trial, or to arrest the judgment, on the ground, first, that the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and, secondly, that the declaration contained no allegation of any undertaking on the part of the defendant to carry the lime directly from Bewly Cliff to the Regent's Canal, an allegation which, it was contended on the authority of Max v. Roberts, 12 East, 89, was essential to the plaintiff's recovery.

TINDAL, C. J.[15] * * * As to the first point, * * * the objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker v. James, 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, * * * we cannot but think that the law does imply a duty in the owner of a vessel,

[15] The statement has been shortened, and parts of the opinion omitted.

whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff. Rule discharged.[16]

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CONSULATE OF THE SEA, c. 49: "* * * If the said managing owner of a ship shall make the said agreement or promise [to tow another vessel] without the knowledge and assent of the merchants who shall be on board the ship or shall intend to put or shall have put goods on board, if any accident supervenes the merchants are not responsible for anything. On the contrary, if the said merchants sustain any damage * * * the said managing owner of the ship is bound to make full restitution, even if the ship shall have to be sold. * * *"

[16] In Lilley v. Doubleday, 7 Q. B. D. 510 (1881), an action against a warehouseman for loss by fire, Grove, J., said: "The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of Davis v. Garrett, which contains very little that is not applicable to this case."

See, also, note in 26 L. R. A. 366 on liability of one who drives a hired horse beyond the place agreed. A mere deviation, though willful and without excuse, does not constitute a conversion, So. Pac. Co. v. Booth (Tex. Civ. App.) 39 S. W. 585 (1897); and see an article by Professor G. L. Clark on The Test of Conversion, 21 Harv. Law Rev. 408, 410.

A carrier guilty of unexcused departure from the agreed route or method of transportation is liable for loss, though from a cause excepted in the bill of lading. Merrick v. Webster, 3 Mich. 268 (1854), goods carried by steamer instead of sailing vessel; Bazin v. S. S. Co., Fed. Cas. No. 1,152 (1857); Goodrich v. Thompson, 44 N. Y. 324 (1871), by another vessel than that named; Maghee v. Camden R. Co., 45 N. Y. 514, 6 Am. Rep. 124 (1871), by water instead of by rail; The Delaware, post, p. 426, on deck instead of below; Robinson v. Merchants' Despatch, 45 Iowa, 470 (1877), breach of contract to carry without transfer to cars of another company; Chicago, etc., Co. v. Dunlap, 71 Kan. 67, 80 P. 34 (1905), goods inadvertently carried beyond destination, agreement as to value held unenforceable. But see Foster v. Gt. Western Ry. Co., [1904] 2 K. B. 306. In Joseph Thorley, Ltd., v. Orchis S. S. Co., [1907] 1 K. B. 660, a deviation during the voyage was held to render inapplicable an exemption from liability for negligence in discharging at destination.

In Internationale Guano en Superphosphaatwerken v. MacAndrew, [1909] 2 K. B. 360, deviation increased damage due to unfitness of the cargo for a long voyage. No recovery was permitted for so much of the damage, though it happened during deviation, as would have happened in the same way without deviation.

## CROCKER v. JACKSON.

(District Court, D. Massachusetts, 1847. 1 Spr. 141, Fed. Cas. No. 3,398.)

This was a libel, on behalf of the owners of the bark La Grange, against the respondent, a consignee of part of the cargo, to recover a contribution for damage sustained by the voluntary stranding of that vessel, near Provincetown, during a gale. The respondent was insured by the Merchants' Insurance Company, and the defense was made in their behalf. The defense principally relied upon was that La Grange had previously committed a deviation, in going out of her course, to speak, and then taking in tow, a vessel in distress. * * *

SPRAGUE, District Judge,[17] in delivering his opinion, said, in substance: Delay to save life is not a deviation; but delay merely to save property, is. * * *

In this case, when the brig was seen in distress, it was the duty of the La Grange to run down to her, to ascertain whether the persons on board needed relief; and upon learning that they did, she was bound to take the necessary measures to afford it; and this constitutes no deviation. As the sea and wind were such, that the crew of the brig could not be transferred to the La Grange, and both vessels were fast drifting out of their course, the taking of the brig in tow was the proper mode of relief.

The only serious question is, whether the towing was continued too long. It is urged in behalf of the respondents, that the object of the captain of the La Grange was pecuniary gain, by earning salvage. But the crew of the brig needed assistance, and it must be presumed that the master was also actuated by a desire to afford them relief. Now there being a double motive, to relieve distress and to save property, does not render the delay a deviation, nor impair the merit of the act. The law, so far from discouraging the union of these motives, enhances the amount of salvage compensation, where the saving of property is accompanied by relief to passengers or crew. But if this towing was continued after it had ceased to be necessary to relieve the distress of the crew, and merely to save property, then it was a deviation; but I am not satisfied that it was so continued. * * *

We should not look at the conduct of a master, in such cases, with a jealous scrutiny, nor give such a construction to doubtful acts, as would admonish him that, in order to be safe from judicial condemnation, he must harden his heart, and stint the measure of relief to danger and distress. The humanity and morals of the seas require a more liberal doctrine.

[17] The statement has been shortened, and parts of the opinion have been omitted.

Being of opinion that there was no deviation, I have no occasion to consider the question made at the bar, as to what would have been its effect.

Decree for the libelants, for $195.77, damages and costs.[18]

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## READ v. SPAULDING.

(Superior Court of City of New York, 1859. 5 Bos. 395.)

This was an action against defendant as a common carrier doing business under the name of Spaulding's Express Freight Line to recover for damage to goods injured while in course of transportation by an unprecedented flood. The material facts were agreed upon by the parties at the trial, and the court directed a verdict for plaintiff. Defendant excepted to the action of the court in directing a verdict, and to its refusal to nonsuit the plaintiff. The exceptions were argued at General Term.

WOODRUFF, J.[19] * * * The goods, in all consisting of eighty-six cases, were delivered to the defendant on the 27th day of January, 1857, to be carried and delivered to the plaintiff at Louisville. Eighty-one of these cases were carried and delivered within twelve or fourteen days after they were received in New York; that is to say, they reached Louisville on the 8th or 10th of February.

It was the duty of the defendant to deliver all the goods within a reasonable time, and according to the usual course of business over the route by which they were to be transported. There is nothing in this case to indicate that the eighty-one cases which were so delivered were forwarded with any extraordinary or unusual speed, but the proof is that from ten to fifteen days is the usual time of conveyance. The presumption is, therefore, that if the defendant had performed his duty the five cases, which are the subject of controversy, would have reached Louisville at or about the same time with the others.

But these five cases were brought from the depot of the Western Railroad to the depot of the Central Railroad, at Albany, on Saturday, the 7th of February, when, as before suggested, they ought to have been at or near their destination, Louisville, Kentucky. Whether this delay arose from the detention of the goods in New York, or at the depot of the Western Railroad, or at any intermediate point, is not stated. Nor is any explanation of the cause of delay given or attempted; while it is agreed that freight cars run daily from New York to Albany on the road by which these goods were to leave New York. If any explanation of this delay could be given, it was the duty of the

[18] See, also, Scaramanga v. Stamp, 5 C. P. D. 295 (1880). In that case Bramwell, L. J., said: "It is always justifiable to make away with property in order to save life. Mouse's Case, 12 Rep. 63." And see post, p. 481, note.

[19] The statement has been rewritten, and parts of the opinion have been omitted.

defendant to give it. Enough was shown to cast the burden of proof upon him. He had undertaken to carry, and the delay was, prima facie, not only unreasonable, but apparently the result of gross negligence and want of attention, either in not beginning the carriage in due time or in delaying the progress of the goods after the transportation was begun. It is not for the defendant to require that the plaintiffs should show the cause of the delay.

The result is that the defendant was grossly negligent in the performance of his duty; this delay was a breach of his contract to carry and deliver within a reasonable time; and while so in fault, the goods in his charge were, in the night of Sunday, the 8th, or on the morning of the 9th of February, reached and injured by the extraordinary flood already mentioned.

But the defendant insists that, if the defendant was in fault in respect of the delay which had occurred, he is, nevertheless, not liable for the damage complained of; that, in such case, though the carrier be liable for delay, he is only liable for the immediate consequences of delay: by which he is understood to claim that he is liable only for such damages as the plaintiffs sustained irrespective of the injury to the goods by being wet in the flood at Albany; and, therefore, his damages are to be ascertained by assuming, for the purposes of the assessment, that the goods arrived safely, though not until long after the time when they should have been delivered.

This claim rests upon the ground that the delay was not the proximate cause of the injury. "Causa proxima non remota spectatur."

The delay certainly did not cause the flood. But we think that the defendant cannot find protection in this view of his responsibility. His unexcused neglect of duty did expose the goods to the peril; and when the defendant was found in actual fault, he lost the protection from liability by inevitable accident which the law extends to the carrier in the due performance of his undertaking. From the moment his faulty negligence began, he became an insurer against the consequence which might result therefrom, whether ordinary or extraordinary.

It is true that, in Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695 [reported in the district court under the name of Morrison v. McFadden, post, p. 353], where goods carried in a canal boat were injured by the wrecking of the boat caused by an extraordinary flood, it was held that the carriers were not rendered liable merely by the fact that, when the boat was started on its voyage, one of the horses attached to it was lame, and that, in consequence thereof, such delay occurred as prevented the boat from passing the place where the accident happened, beyond which place it would have been safe. In considering the question, the court liken the carrier to an insurer against loss by perils of the seas, who are said to be not liable for a loss immediately arising from another cause, although, by perils of the sea, the ship had sus-

tained an injury without which the loss would not have taken place.

Possibly a question might be suggested whether, in that case, the mere fact that one of the horses was lame was enough to charge the defendants; but it must be conceded that, in the view taken by the court, the case is strikingly like the present. We are, nevertheless, constrained to say that, in so far as the principle of the decision tends to exonerate the present defendant, we cannot give it our assent.

A common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself. His act or neglect must not concur and contribute to the injury. If he departs from the line of duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused damage, he is not protected.

The defendant was bound to deliver the goods in a sound condition. If prevented by the act of God, he is excused; but if his own misconduct contributed to the injury by exposing the goods needlessly or improperly to the peril, his excuse fails. All ordinary perils from even the act of God he was, even while engaged in the faithful performance of his duty, bound to foresee and guard against by the exercise of a care and diligence proportioned to the danger. He was not bound to anticipate and guard against extraordinary perils which human foresight would not anticipate; but it was his duty to do nothing which should expose the goods to any perils which would not arise in the proper and diligent prosecution of the journey which he had undertaken. And if he, by needless delay, subjected the goods to damage, from whatever cause concurring or coöperating therein, he is liable.

This we believe to be in accordance with sound policy, just in its operation, and sustained by the weight of authority.

Thus, if a carrier by water deviates from his voyage and the ship and goods are lost, he is liable, although the loss was by a peril of the sea. He is not at liberty improperly to encounter mischief, even from such a cause. In principle, it can make no difference whether his deviation is intentional or negligent; it is sufficient that he is in fault, and that subjects him to liability.

So, where a carrier by land deviated from the direct and principal route, and the goods were lost by a cause which might, had he been without fault, have excused him on the score of inevitable accident, he was held liable because the loss happened in consequence of his own improper conduct; he had no right so to deviate. * * *

The plaintiff should have judgment on the verdict. Ordered accordingly.[20]

[20] Affirmed 30 N. Y. 630, 86 Am. Dec. 426 (1864).

Delay in the prosecution of a voyage may be such that, like a deviation from the course of the voyage, it discharges underwriters.

"The single point before the court is whether there has not been what is

## SECTION 5.—SEAWORTHINESS.

CONSULATE OF THE SEA, c. 23: If goods be damaged by rats, and there is no cat on board the ship, the managing owner of the ship ought to make compensation; but it has not been declared in the case where a ship has had cats on board in the place where she was laden, and after she had sailed away the said cats have died, and the rats have damaged the goods before the ship has arrived at a place where they could procure cats; if the managing owner of the ship shall buy cats and put them on board as soon as they arrive at a place, where they can find them for sale or as a gift or can get them on board in any manner, he is not bound to make good the said losses for they have not happened through his default.

### THE CALEDONIA.

(Supreme Court of the United States, 1895. 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.)

This was an appeal from a decree of the Circuit Court affirming a decree of the District Court against the steamship Caledonia in a suit in admiralty brought by a shipper of cattle to recover damages

equivalent to a deviation, whether the risk has not been varied, no matter whether the risk has or has not been thereby increased." Lord Mansfield, in Hartley v. Buggin, 1 Park, Ins. 513 (1781), quoted by Tindal, C. J., in Mount v. Larkins, 8 Bing. 108 (1831).

"Unquestionably, an idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation which discharges the underwriters." Marshall, C. J., in Oliver v. Maryland Ins. Co., 7 Cranch, 487, 3 L. Ed. 414 (1813).

"The assured has no right to substitute a different voyage for that which is insured, and can only recover for a loss sustained while the ship is prosecuting the voyage named in the policy; and if she has deviated prior to the loss, she is not then prosecuting the voyage for which she was insured. Whenever, therefore, she departs from the route, or delays in the prosecution of it, it is incumbent on the assured to show that the departure was caused by necessity, or that the delay at a port named in the policy was reasonable under the circumstances in order to accomplish the objects of the voyage." Endicott, J., in Amsinck v. American Ins. Co., 129 Mass. 185 (1880).

"If a master shall weigh anchor, and stand out to his voyage after the time covenanted or agreed on for his departure, if any damage happens at sea after that time, he shall refund and make good all such misfortune." Molloy, De Jure Maritimo, bk. II, c. 4, § 6.

The following cases hold that willful delay, like deviation, renders a carrier liable even for loss by act of God: Michaels v. N. Y. Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415 (1864); Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361 (1905); Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa, 126, 106 N. W. 498, 5 L. R. A. (N. S.) 882 (1906) negligent delay; Alabama Gt. So. R. Co. v. Quarles, 40 South. 120, 145 Ala. 436, 5 L. R. A. (N. S.) 867, 117 Am. St.

caused by the prolongation of the voyage due to the breaking of the vessel's shaft at sea. The Circuit Court found that libelant, at Boston, shipped cattle on board the Caledonia, employed as a common carrier, to be transported to Deptford, a voyage usually of about thirteen days. When nine days out, the propeller shaft broke, because it had been weakened by heavy seas on previous voyages. At the time of leaving Boston, it was in fact unfit for the voyage, and the vessel was unseaworthy in consequence. No defect in the shaft was visible or could have been detected by usual and reasonable means if the shaft had been taken out and examined. No negligence of the carrier was proved.

Because of the breaking of the shaft, the voyage was prolonged to twenty-five days, the cattle were put on short allowance of food and landed in an emaciated condition. The libelant, as the carrier knew, shipped his cattle for the purpose of selling them on arrival. Because of the delay they sold for $7,850 less than they would otherwise have brought. Half of this loss was due to their shrinkage in weight; half to a fall in the price of cattle during the delay.

The Circuit Court held the steamship liable for the entire loss because of her unseaworthiness.

FULLER, C. J.[21] In The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688, the language of Mr. Justice Gray, delivering the opinion of the Circuit Court in the present case, was quoted

Rep. 54 (1906); Ala. Gt. So. R. Co. v. Elliott, 150 Ala. 381, 43 South. 738, 9 L. R. A. (N. S.) 1264, 124 Am. St. Rep. 172 (1907); Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823 (1906). To the same effect are Cassilay v. Young, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505 (1843); Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332 (1896); The Citta di Messina (D. C.) 169 Fed. 472 (1909). *Contra:* International, etc., R. Co. v. Bergman (Tex. Civ. App.) 64 S. W. 999 (1901); Gulf, etc., Ry. Co. v. Darby, 28 Tex. Civ. App. 229, 67 S. W. 129 (1902); Hunt v. Mo., K. & T. Ry. Co. (Tex. Civ. App.) 74 S. W. 69 (1903); Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322 (1903); Moffatt Com. Co. v. Union Pac. R. Co., 113 Mo. App. 544, 88 S. W. 117 (1905); Empire State Cattle Co. v. Atchison, etc., R. Co. (C. C.) 135 Fed. 135 (1905); Rodgers v. Mo. Pac. Ry. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416 (1907). See, also, Denny v. N. Y. Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645 (1859); Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909 (1869); Morrison v. Davis, post, p. 855, note.

That willful delay, like deviation, invalidates exemptions in a bill of lading was held in Condict v. Grand Trunk R. Co., 54 N. Y. 500 (1873); Hernsheim v. Newport News, etc., Co., 35 S. W. 1115, 18 Ky. Law Rep. 227 (1896); Louisville & N. R. Co. v. Gidley, 119 Ala. 523, 24 South. 753 (1898). *Contra:* Hoadley v. Northern Trans. Co., 115 Mass. 304, 15 Am. Rep. 106 (1874); Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852 (1893). And see Reid v. Evansville R. Co., 10 Ind. App. 385, 35 N. E. 703, 53 Am. St. Rep. 391 (1893); Yazoo R. Co. v. Millsaps, 76 Miss. 855, 25 South. 672, 71 Am. St. Rep. 543 (1899); Extinguisher Co. v. Railroad, 137 N. C. 278, 49 S. E. 208 (1904).

For discussions of the subject, see Hutchinson on Carriers (3d Ed.) §§ 297–308; McClain, C. J., in Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882 (1906), cited supra; Rodgers v. Mo. Pac. Ry. Co., cited supra.

[21] The statement of facts has been rewritten, and parts of the opinions omitted.

with approval, to this effect: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated.

The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view.

In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.

The necessity of this conclusion is made obvious when we consider the settled rule in respect of insurance, for it is clear that the undertaking as to seaworthiness of the shipowner to the shipper is coextensive with that of the shipper to his insurer.

That rule is thus given by Parsons (1 Mar. Ins. 367): "Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is, in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety. * * * This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and, if this condition be broken at the inception of the risk, in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void."

In Kopitoff v. Wilson, 1 Q. B. D. 377, 379, 381, although, as there was no necessity to consider the law as to latent defects, whether such defects would constitute an exception cannot be said to have been passed on, the general rule was laid down as we have stated it, and the existence of the warranty in question on the part of a shipowner was asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a carrier. That was an action in which the plaintiff sought to recover damages for the loss of a large number of weighty iron armor plates and bolts, one of the

plates having broken loose and gone through the side of the ship, which, in consequence, went down in deep water and was totally lost with all her cargo. The case was tried before Blackburn, J., who told the jury as matter of law that the shipowner warranted the fitness of his ship when she sailed, and not merely that he had honestly and in good faith endeavored to make her fit, and left the following questions to the jury: "Was the vessel at the time of her sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt? Second. If she was not in a fit state, was the loss that happened caused by that unfitness?"

The rule for new trial was discharged in view of the warranty by implication that the ship was in a condition to perform the voyage then about to be undertaken, and Field, J., among other things, said: "It appears to us, also, that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine policy the assured comes under an implied warranty of seaworthiness to his assurer, and, if we were to hold that he has not the benefit of a similar implication in a contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship."

This was the view expressed by Mr. Justice Brown, then District Judge, in The Eugene Vesta (D. C.) 28 Fed. 762, 763, in which he said: "There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy, not only when she begins to take cargo on board, but when she breaks ground for the voyage. The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends." And the case of Cohn v. Davidson, 2 Q. B. D. 455, 461, was cited, where it appeared that the ship was not in fact seaworthy at the time she set sail, but that as she was found to be seaworthy at the time she commenced to take cargo, she must have received the damage in the course of loading; and Field, J., observed that "no degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against

his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity, by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavor to secure."[22] * * *

It is urged that doubt is thrown upon the doctrine by the reasoning in Readhead v. Railroad Co., L. R. 4 Q. B. 379, L. R. 2 Q. B. 412. There a passenger sought to charge a common carrier for an injury occasioned by the breaking of an axle by reason of a hidden flaw; and the court of exchequer chamber held that a contract made by a general carrier of passengers for hire with a passenger is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is not a warranty that the carriage in which he travels shall be free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence. But the court was careful to point out the broad distinction between the liabilities of common carriers of goods and of passengers, and in the case at bar the shipowner was not only liable as such, but as a common carrier, and subject to the responsibilities of that relation.

That case was decided in 1869, and those of The Glenfruin [10 Prob. Div. 103] and The Laertes [12 Prob. Div. 187] in 1885 and 1887; yet the latter rulings seem to have been accepted without question, and were certainly unaffected by any attempt to apply a rule in respect of roadworthiness in the carriage of passengers by a railroad to the warranty of seaworthiness in the carriage of goods by a ship.

In our judgment, the circuit court rightly held that the warranty was absolute; that the Caledonia was unseaworthy when she left port; and that that was the cause of the damage to libelant's cattle.[23] * * *

Decree affirmed.

BROWN, J., with whom concurred HARLAN and BREWER, JJ. (dissenting). * * * Conceding, for the purposes of this case, that under the stringent rule laid down by this court in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 428, 10 Sup. Ct. 934, 34 L. Ed. 398, and The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, the carrier is bound to respond for any loss of or direct damage to goods in consequence of a breach of his implied warranty of seaworthiness, whether such unseaworthiness were known or unknown, discoverable or undiscoverable, it does not necessarily follow that he is subject to the same measure of liability

[22] The learned judge here reviewed other authorities.

[23] The rest of the opinion deals with the provisions of the bill of lading, which are construed as not intended to affect liability for unseaworthiness, and with the question of damages.

for damages occasioned by mere delay in making the voyage within the usual time.

All the cases cited in the opinion of the court are those wherein either the ship or the cargo has suffered loss or direct damage by reason of her unseaworthiness at the commencement of the voyage. Both in this court and in the court below the case is treated as one involving the liability of the carrier as an insurer of the goods in question. The authorities, however, make a clear distinction between the loss of or direct damage to goods on account of unseaworthiness and the consequences of mere delay. In the one case the contract is to deliver the goods at all events, the acts of God and the perils of the sea alone excepted. In the other, it is to use all reasonable exertions to carry the goods to the port of destination within the usual time. * * *

As it is admitted in this case that the delay was occasioned by a defect in the ship, which could not have been discovered by the ordinary methods of inspection, it seems to me clear that the carrier should not be held responsible. If it be said that the damages in this case were the direct consequences of the breach of warranty of seaworthiness, the reply is that for such damages the ship is not responsible, provided her owner has used due diligence to make her seaworthy, although, if the goods had been lost or destroyed, he would have been liable as insurer.[24] * * *

[24] An insured cargo owner is not completely protected by the warranty of seaworthiness, for unseaworthiness vitiates a policy of insurance, though it has no connection with the loss. London Assurance v. Companhia de Moagens, 167 U. S. 149, 167, 17 Sup. Ct. 785, 42 L. Ed. 113 (1897). But it renders the carrier liable only for a loss to which it contributes as a cause. Hart v. Allen, 2 Watts (Pa.) 114 (1833); The Planter, 2 Woods, 490, Fed. Cas. No. 11,207a (1874).

There is no warranty of seaworthiness in the maritime carriage of passengers, The Nederland, 7 Fed. 926 (1881); nor does a carrier of passengers or of goods warrant the fitness of vehicles for carriage by land. See Readhead v. Midland Ry. Co., L. R. 4 Q. B. 379, 383 (1869); Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346 (1845).

The warranty of seaworthiness exists, though the ship is a private carrier. The Planter, 2 Woods, 490, Fed. Cas. No. 11,207a (1874). It extends to equipment. A vessel may be unseaworthy for lack of a competent crew. The Giles Loring (D. C.) 48 Fed. 463 (1890). It is not confined to the fitness of the vessel to make the voyage in safety to herself. She is unseaworthy, if her condition is likely to damage her cargo. Thus a vessel carrying meat may be unseaworthy because of defect in her refrigerating apparatus. The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65 (1903). But it seems that the warranty is not of absolute fitness, and that a vessel is seaworthy, when competent persons who knew her condition would, according to existing knowledge and usages, deem her fit for the voyage, although subsequent experience would recommend additional precautions. The Titania (D. C.) 19 Fed. 101 (1883).

## SECTION 6.—CARE OF GOODS AND PASSENGERS

TABLE OF AMALFI, art. 44: The master of a ship is bound, whenever he loses anything out of the ship, * * * to run and exert himself to the utmost of his power to recover the whole of that which he has lost.

CONSULATE OF THE SEA, c. 16: If you wish to know what are the duties of the managing owner of a ship or vessel towards the merchants you may learn it here. The managing owner of a ship is bound to protect and guard the merchants and the passengers [25] and every person who sails in the ship, equally whether he be of high or low degree, and to assist him to the utmost of his power against all men, and to defend him against corsairs and all persons who would do him harm. Besides the managing owner of the ship is bound to keep from harm all his goods and effects, and to protect and guard them as above said. And he ought to make the ship's mate and the officers of the forecastle and the part owners and the mariners and all those who receive wages from the ship swear that they will help to save and guard the merchants and their effects and the effects of all on board the ship to the utmost of their power; still further that they will not disclose the secrets of any one, nor provoke a dispute, nor commit a theft, nor make a quarrel against any of the above-mentioned persons; and further that they will not take ashore nor put on board anything by night or by day, which the ship's mate or the man of the watch does not know of.

### NOTARA v. HENDERSON.

(Court of Exchequer Chamber, 1872. L. R. 7 Q. B. 225.)

WILLES, J.[26] This is an action by the shippers of beans on board a steamship called the Trojan, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs, by an accident of the sea, from the direct and proximate effect of which the beans were wetted, and from the remote effects of which, for want of drying, they were further seriously damaged. * * * The shippers do not claim in

[25] "The term 'passenger' includes all who ought to pay freight for their persons apart from their merchandise." Consulate of the Sea, c. 1.

[26] Parts of the opinion are omitted.

respect of the damage necessarily caused by the collision and its unavoidable results, but only for the estimated aggravation of that damage by reason of nothing having been done in the way of drying to arrest or mitigate decomposition, and for that amount (£666 1s. 5d.) they obtained judgment in the Court of Queen's Bench.

Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage occasioned by the collision. * * *

That a duty to take care of the goods generally exists cannot be doubted; and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which originally the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk.

It is remarkable that, upon a question so familiar to persons conversant with maritime affairs, and which has so constantly to be considered from another point of view in settling claims upon policies of insurance, the reported authorities in this country, so far as regards the mutual rights and liabilities of shipper and shipowner, should be so rare. The only case in which it was much discussed is that of Tronson v. Dent, 8 Moo. P. C. 419. [The learned judge then considered that case.] * * *

The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accidents is, however, distinctly recognized in the maritime law in one important particular—wherein it follows the civil law, which, though it be not recognized as jus commune, either here or abroad, in mercantile or maritime affairs (see Balcasseroni, Leggi del Cambio, 31), has been the source of many valuable rules—namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average.[27] This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not obligatory. There is, however, this marked distinction: That the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees. (Pothier, Obligations, art. 142, and Nantissement, art. 29 et seq., and as to extraordinary expenses, articles 60, 61; and also under the special head of care imposed upon masters, Louages Maritimes, Charte-partie, art. 31.) This

[27] See note to Cargo ex Argos, post, p. 311.

obligation on the part of the master has been commonly recognized, both in respect of preserving goods on board in a state of safety by pumping, ventilation, and other proper means, and of saving goods which by accident have been exposed to danger. Thus, even in case of wreck, it is laid down, in a work on sea laws, approved by Lord Stowell (The Neptune, 1 Hagg. Adm., at page 232), that the master "ought to preserve the most valuable goods first, and by attention and presence of mind endeavor to lessen the evil; and save, or help to save, as much as possible." Jacobsen, book 2, c. I, p. 112. * * *

There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest. As, for instance, in the case of a perishable cargo so damaged by salt water that it could not, in its existing state, be taken forward in specie to the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it, or abandon it, would give no right to freight pro rata against the owner of the cargo,[28] nor any right to recover against the underwriter upon freight. Mordy v. Jones, 4 B. & C. 394, recognized in Philpott v. Swan, 11 C. B. (N. S.) at page 281. * * *

In such a case, if the process were also for the benefit of the owner of the cargo, the expenses would have fallen, according to the ordinary practice, upon the cargo as particular average. It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo by active measures, if necessary, at the expense of the cargo, is owing only to the shipowner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state and in arresting the damage to which it has become liable by accidents of the sea, for the benefit of all who are concerned in the adventure?

In the result it appears to us that the duty of the master, in this respect, is not, like the authority to tranship, a power for the benefit of the shipowner only to secure his freight (De Cuadra v. Swan, 16 C. B. [N. S.] 772), but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.

[28] For the right to freight on goods not carried to destination, see post, p. 268, note.

The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care, which want is popularly described as "gross negligence." * * *

For these reasons we think the shipowners are answerable for the conduct of the master, in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool.

This raises, in the end, the question of fact, whether there was a breach of the duty thus affirmed, a question which, though properly one for a jury, we are, under the power given in the special case to draw inferences of fact, and the thirty-second section of the Common Law Procedure Act, 1854, bound to determine. It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty. * * *

The facts stated are all in favor of the conclusion that the beans might have been dried, during an insignificant delay, at a moderate expense, which there would have been no difficulty in providing from or upon the credit of the shippers; and no circumstance is stated to show any special risk, trouble, inconvenience, or other objection. The master thought proper, as he was entitled to do, to reject the offer of the shippers to take the beans out of his hands upon terms not unreasonable, and insisted, as he was entitled to do, upon keeping them in pledge for the future freight; and having done so, he thought proper to reship and replace a large part of them and to put to sea with

them in a state in which no prudent or reasonable man would have shipped or put to sea with them, taking the risk of their arriving at Glasgow just in the state of beans, so as to carry full freight for the shipowners, but largely deteriorated by the fermentation during the transit.

We thus agree with the court below, that the duty exists in law, and that, under the circumstances, the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages.

The judgment of the Court of Queen's Bench must therefore be affirmed. Judgment affirmed.[29]

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## CRAKER v. CHICAGO & N. W. RY. CO.

**(Supreme Court of Wisconsin, 1875. 36 Wis. 657, 17 Am. Rep. 504.)**

Appeal from the circuit court for Sauk county.

Action for insulting, violent and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial. * * *

The court refused a nonsuit, and instructed the jury, in substance, that if plaintiff, whilst a passenger as above stated, was abused, insulted or ill-treated by the conductor of the train, defendant was liable to her for such injury as might be found from the evidence to have been inflicted. * * * Defendant requested the court to instruct the jury, that upon the evidence plaintiff was not entitled to recover, "the acts of the conductor complained of not having been

[29] See, also, Steamboat Lynx v. King, 12 Mo. 272, 49 Am. Dec. 135 (1848); Chouteaux v. Leech, 18 Pa. 224, 57 Am. Dec. 602 (1852), post, pp. 128, note, 311 note.

"Now here it appears that the waggoner was informed more than once of the leakage, after which notice it was a duty he owed to his employers to have the leak examined and stopped at one of the stages where he halted. That being so, the carrier became clearly liable on this ground, independently of the other point in the case, and therefore I cannot consent to disturbing the verdict." Lord Ellenborough, in Beck v. Evans, 16 East, 244 (1812).

It is a carrier's duty to break packages when that is necessary for saving the goods. Bird v. Cromwell, 1 Mo. 59, 13 Am. Dec. 470 (1821).

It may become his duty to sell the goods. "* * * When a cargo on freight is so much injured that, though capable of being carried to the port of destination and there landed, yet, from its present state, it will endanger the safety as well of the ship as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place where the necessity arises, whether it be the original port of the shipment to which the ship returns, or any intermediate port at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice for him to sacrifice the cargo for the benefit of another party in interest, or to elect the party upon whom the ruin, caused by a common calamity, should fall." Story, J., in Jordan v. Warren Ins. Co., 1 Story, 342, Fed. Cas. No. 7,524 (1840). Acc. Cockburn, C. J., in Notara v. Henderson, L. R. 5 Q. B. 346 (1870).

committed within the scope of his employment or in the performance of any actual or supposed duty"; but the instruction was refused. Plaintiff had a verdict for $1,000 damages; a new trial was denied; and defendant appealed from a judgment on the verdict.

RYAN, C. J.[80] We cannot help thinking that there has been some useless subtlety in the books in the application of the rule respondeat superior, and some unnecessary confusion in the liability of principals for willful and malicious acts of agents. * * * In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in Ellis v. Turner (1800) 8 T. R. 531.

But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. * * *

The case of Weed v. P. R. Co. (1858) 17 N. Y. 362, 72 Am. Dec. 474, will be found to be a clear and well-reasoned case upon the subject. It was there held that it was no defense to an action against a railroad corporation, for its failure to transport a passenger with proper dispatch, that the delay was the willful act of the conductor in charge of the train. The rule established by that case, as we think with much reason, is that, where the misconduct of the agent causes a breach of the obligation or contract of the principal, there the principal will be liable in an action, whether such misconduct be willful or malicious, or merely negligent. * * *

In Bass v. Railway Co. (1874) 36 Wis. 450, 17 Am. Rep. 495, we had occasion also to consider somewhat the nature of the obligations of railroad companies to their passengers under the contract of carriage; the "careful transportation" of Railroad Co. v. Finney [10 Wis. 388]. On the authority of such jurists as Story, J., and Shaw, C. J., we likened them to those of innkeepers. And, speaking of female passengers, we said: "To such, the protection which is the natural instinct of manhood towards their sex is specially due by common carriers." In Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62, the duties of common carriers are said to "include everything calculated to render the transportation most comfortable and least annoying to passengers." In Nieto v. Clark, 1 Cliff. 145, Fed. Cas. No. 10,262, the court says: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall

[80] Parts of the statement of facts and of the opinion are omitted.

be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach."

Long before, Story, J., had used this comprehensive and beautiful language, worthy of him as jurist and gentleman, in Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575: "It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil." These things were said, indeed, of passage by water, but they apply equally to passage by railroad. Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

These were among the duties of the appellant to the respondent, when she went as passenger on its train; duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her. If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. Stephen v. Smith, 29 Vt. 160; Railroad Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Commonwealth v. Power, supra; Nieto v. Clark, supra; and other cases cited in Bass v. Railway Co., supra.

We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a reductio ad absurdum.

The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appoint-

ed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity. * * * It is enough to say that the appellant's contract of careful carriage with the respondent was not kept, was tortiously violated, by the officer appointed by the appellant to keep it. * * *

We cannot think that there is a question of the respondent's right to recover against the appellant, for a tort which was a breach of the contract of carriage. We might well rest our decision on principle. But we also think that it is abundantly sanctioned by authority. [Citing cases.] There are cases, even of recent date, which hold the other way. But we think that the great weight of authority and the tendency of decision sanction our position. * * *

The judgment of the court below is affirmed.[81]

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## TEXAS & P. RY. CO. v. JONES.

**(Court of Civil Appeals of Texas, 1897. 39 S. W. 124.)**

Action by Jessie Jones and another against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals.

HUNTER, J.[82] * * * Appellant complains of the following charge, as being upon the weight of the evidence, and as submitting an improper measure of damages, contending that, unless there was bodily injury, no damage could be recovered for mental suffering: "If you find and believe that on or about the 5th day of April, 1892, J. E. Pitzer was the agent of defendant in charge of its station at Millsap; and if you believe that the defendant had and maintained a depot for passengers at said point; and if you believe that the said J. E. Pitzer was the agent of defendant, and in charge of its said

[81] See, also, Goddard v. Grand Trunk Ry., 57 Me. 202, 2 Am. Rep. 39 (1869); Chicago, etc., R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33 (1882); Savannah, Fla. & W. Ry. Co. v. Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85 (1897); Haver v. Central R. Co., 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647 (1898). In Hayne v. Union St. Ry. Co., 189 Mass. 551, 76 N. E. 219, 3 L. R. A. (N. S.) 605, 109 Am. St. Rep. 655 (1905), a conductor of one of defendant's cars threw a dead hen in sport at the motorman of another of defendant's cars, as it was passing, broke a window, and thereby injured the plaintiff, a passenger. Knowlton, C. J., said: "If one of the reasons for the liability is that the servant, through his relation to his master, owes a duty to protect the passenger from injuries by others, and a fortiori from injuries by himself, this duty, so far as it relates to the last branch of the obligation, is not confined to servants the nature of whose service requires them to give personal attention to the passenger in reference to possible injuries from others, but it includes those employed in the general business of transportation, and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not."

[82] Parts of the opinion are omitted.

depot; and if you believe that on said day the plaintiff Jessie Jones was in said depot for the purpose of taking passage on one of the trains of the defendant; if you believe that while the plaintiff was in said depot, waiting to take one of the defendant's trains, the wife of said agent, J. E. Pitzer, did, in the presence and hearing of said J. E. Pitzer, abuse and insult plaintiff Jessie Jones, by charging her, the said Jessie Jones, with being indecent, or with having undressed before men, or with having stolen scissors from the said Mrs. Pitzer; and if you believe that the said J. E. Pitzer made no effort to protect the plaintiff from such insult; and if you believe that the said J. E. Pitzer could, by the use of reasonable effort, have prevented such insult; and if you believe that thereby plaintiff Jessie Jones was mortified and humiliated, and that she suffered mental pain or anguish, and that she was thereby made sick, and suffered bodily pain, and was thereby damaged—you will find for the plaintiff such actual damages as she sustained on account of such insult." We are of opinion that the charge is not subject to the objections made. The language recited in the charge was plainly abusive and insulting language, and it was not a charge on the weight of evidence for the court to so treat it.

On her right to recover damages for mental suffering, we think that it was the duty of the appellant's station agent to protect appellee from insult and abuse from all persons while she was at its station, waiting to become a passenger on its train, whether she received physical injuries or did not. Leach v. Leach, 11 Tex. Civ. App. 699, 33 S. W. 703. * * * This court intimated on a former appeal of this case (29 S. W. 499) that appellee was probably entitled to protection at the time she was abused and insulted, although she had not then bought her ticket; citing Hutch. Carr. § 559. We now hold in accordance with that intimation. And we also think that the agents and servants of appellant were bound to legal notice of the fact that she was there with the intention of becoming a passenger, and therefore entitled to the protection which that relation conferred upon her, because of her presence in the waiting room with such intention at the usual time for the assembling of persons at such place for such purpose. Id. §§ 554–559. We find no error in the judgment, and it is affirmed.[88]

[88] A carrier's duty to use care to keep his passenger from harm is illustrated by the following cases: Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224 (1867), passengers fighting in car; King v. Railway Co. (C. C.) 22 Fed. 413 (1884), failure to eject or disarm passenger crazed by drink; Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483 (1887), admitting to car strikebreaker, whose presence was likely to lead to attack by mob; Richmond & Danville R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87 (1892), negro passenger made to dance; Lucy v. Railway Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551 (1896), woman passenger insulted; Exton v. Central R. Co. of N. J, 62 N. J. Law, 7, 42 Atl. 486, 56 L. R. A. 508 (1899), cabmen scuffling in front of station; Texas & Pac.

## ATCHISON, T. & S. F. RY. CO. v. PARRY.

(Supreme Court of Kansas, 1903. 67 Kan. 515, 73 Pac. 105.)

CUNNINGHAM, J.[84] Robert Parry was a passenger on the Santa Fé Railway going from Purcell, Ind. T., to Denver, Colo. In making this journey he was required to change cars at Newton, Kan. As the train approached Newton, and a mile or two south of it, the conductor observed that Parry was ailing with something that looked to him like a fit. He noticed that Parry "was straightened out, and his limbs was stiff and jerking. He was frothing at the mouth, and his eyes looked glaring and starry, just like a man that had a fit." When the train arrived at Newton, Parry seemed to be recovering, but had not entirely regained consciousness, and the conductor was

Had a fit I was removed to Newton Kansas where I was Kansas Prairie Drains

Ry. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895 (1901), passenger assaulted after leaving train, but before leaving station; Texas, etc., Ry. Co. v. Tarkington, 27 Tex. Civ. App. 353, 66 S. W. 137 (1901), passenger accused by conductor of dishonestly trying to evade fare; Bosworth v. Union R. Co., post, p. 331 (1903), street car attacked by mob; Seawell v. Carolina Central R. Co., 132 N. C. 856, 44 S. E. 610 (1903), passenger waiting to take train pelted with eggs; Kuhlen v. B. & N. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516 (1907), crowding in entering car at station.

But a carrier is not liable if unable to anticipate or suppress disorder. Batton v. So. Ala. R. Co., 77 Ala. 591, 54 Am. Rep. 80 (1884), indecent language; Ellinger v. P., W. & B. R. Co., 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697 (1893), rude jostling by passenger entering car; Madden v. N. C. R. Co., 98 App. Div. 406, 90 N. Y. Supp. 261 (1904), crowd rushing into excursion train; Connell v. Chesapeake, etc., Ry. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786 (1896), passenger in sleeping car shot by robber; Tall v. Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120 (1899), shooting affray between gamblers; Brunswick & Western R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152 (1903), illegal arrest by officer under claim of authority. And the duty does not exist towards persons not passengers. Houston & Texas Central R. Co. v. Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868 (1902), husband of sick passenger taking her to train. And see Williams v. Pullman Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512 (1888), assault by porter on person entering Pullman car without right.

OBLIGATION OF SLEEPING CAR COMPANY AS TO CARE OF PASSENGERS.—A sleeping car company owes to its passengers a duty to guard them with care from harm at the hands of others, and is liable, though the injury is inflicted by the willful and wanton act of its servant. In Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135 (1887), Morton, C. J., said: "A sleeping car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, the cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. * * * The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier, or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it." See, further, as to the liability of sleeping car companies, 21 L. R. A. 289, note; Carriers, 9 Cent. Dig. §§ 1579–1589, 1593–1596, 4 Dec. Dig. §§ 411, 413, 416, 417.

[84] Parts of the opinion are omitted.

unable to get any response when he tried to converse with him. The conductor called the depot master, who, with the assistance of the porter, removed Parry from the train; the depot master being informed by the conductor of the condition of the passenger, and requested to take care of him, and see that he was put upon the right train to take him to his destination, which train was to leave in about four hours.

After the passenger was removed from the train, he was left in the care of the depot master, the porter going to his other duties. The depot master tried to talk with him, but elicited nothing but groans, mutterings, and unintelligible replies. It seemed, however, that he desired to go his own way without any assistance, so that, after helping him on with his coat, he was allowed, after about five or ten minutes, to take his own course, without further attention, the depot master supposing that he had been drinking, and desired to go where he could procure liquor. The next seen of him was about four hours after his removal from the train, at a point about five miles south of Newton, where, having lain down upon the railway tracks, he was run over by a south-bound train and killed.

The negligence counted upon by the plaintiff, his widow, as a ground for recovery, was that the company failed to exercise a proper degree of caution and care in looking after Parry after he was removed from the train in an unconscious and irresponsible condition of mind and body. The jury returned a general verdict in favor of the defendant in error, and also answered special questions submitted to them. * * *

The railway company insists that the judgment against it was erroneous, first, because there was no evidence showing any culpable negligence on the part of any of its agents or servants; second, if there was, that such negligence was not the proximate cause of the injury. The principles to which we must look for a solution of these questions are neither novel nor intricate. Parry was a passenger, not only while on the train, but after his arrival at Newton. Through no fault of his, he was in such a condition of mind and body as to be unable to care for himself by reason of the sudden sickness which had overtaken him.

The duty of a carrier of passengers under such circumstances was announced in the syllabus in A. T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, in the following language: "Where an unattended passenger, after entering upon a journey, becomes sick and unconscious or insane, it is the duty of the railroad company to remove him from the train, and leave him until he is in a fit condition to resume his journey, or until he shall obtain the necessary assistance to take care of him to the end of his journey. The duty of a railroad company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in

temporarily providing for his protection and comfort." The following language is found in the opinion: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the cause: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers; but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made.'"

Whether or not the depot master discharged this duty to its required measure in this case was a question for the jury to determine. The jury did determine that he possessed the common and ordinary capabilities, judgment, and prudence of men generally, and that at the time he ceased to look after Parry he thought that deceased had sufficient strength and consciousness to take care of himself, and did not contemplate that he would wander away into a place of danger. We think, however, that this hardly shows affirmatively that degree of care commensurate with the duty resting upon the company. It is not thus made to appear that reasonable and ordinary care in providing for the safety of the deceased was exercised; whereas by the general verdict it does appear that such care was not exercised. * * *

The judgment will be affirmed.[85]

[85] See, also, Croom v. Chicago, etc., Co., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557 (1893); Railway Co. v. Salzman, 52 Ohio St. 558, 40 N. E. 891, 49 Am. St. Rep. 745 (1895); Connolly v. Crescent, etc., Co., 41 La. Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389 (1896); Wells v. N. Y. C. R. Co., 25 App. Div. 365, 49 N. Y. Supp. 510 (1898); Ill. Cent. Ry. v. Allen, post, p. 534; Horn v. So. Ry., 78 S. C. 67, 58 S. E. 963 (1907), conductor bound to give woman incumbered with parcels needed assistance in alighting. But compare Pounder v. N. E. Ry. Co., [1892] 1 Q. B. 385, with which compare Blain v. Railway Co., 5 Ont. L. R. 334 (1903).

In Sullivan v. Seattle El. Co., 44 Wash. 53, 86 Pac. 786 (1906), defendant permitted an intoxicated passenger to leave its car at night at a regular station, where the station platform, surrounded with a substantial railing, and the tracks, extended upon a trestle over a lake. He fell into the lake and was drowned. Fullerton, J., said: "A carrier is not obligated to receive a helpless, imbecile, or drunken person as a passenger, when unattended; but, if it does receive him, it must give him such care as will insure him a safe passage to some proper destination. It cannot lawfully put him off, or permit him to get off, at a place where there is danger of his perishing or coming to harm, even though such a place would be reasonably safe for one in a normal condition."

When a passenger has been made helpless by falling from his train, it seems that it is the railroad's duty to stop the train and take care of him, provided it can be done with due regard to the rights of other passengers. Reed v. Louisville & N. R. Co., 104 Ky. 603, 47 S. W. 591, 48 S. W. 416, 44 L. R. A. 823 (1898). But no such duty exists towards a former passenger, who, having been ejected for misbehavior, falls while attempting to re-enter

## LOUISVILLE, N. O. & T. R. CO. v. PATTERSON.

(Supreme Court of Mississippi, 1898. 69 Miss. 421, 13 South. 697, 22 L. R. A. 259.)

Plaintiff, a white man, purchased a first-class ticket over defendant's road, and got on its train at Vicksburg, Miss., and went into the coach provided for white passengers having first-class tickets. The train consisted of three coaches for passengers. * * * Some of the passengers were asleep, and occupied two seats, and some of the seats were filled with baggage; but none of the seats were vacant. The plaintiff insisted that the conductor should get him a seat; but he refused to do so, and told plaintiff to get a seat in the next coach. He went into the next coach, and got a seat; but the conductor, coming in soon after, required him to leave that coach, as it was the car set apart for the colored passengers. Plaintiff then went into the smoker, but soon left it, because the smoke nauseated him, and went to the conductor, and insisted that he would get him a seat, and threatened to sue the railroad if he did not. The conductor replied in an angry tone that he could get no seat in there, and he "could sue, and be d——d." Plaintiff then went out on the platform, and remained there until he reached a station, when he got off the train. * * * Plaintiff had a verdict and judgment for $75. Defendant's motion for a new trial was overruled, and it appealed.

WOODS, J. The appellee paid for a seat in a first-class coach, and was entitled, as matter of right, to have the servants of the railway company who were in charge of the train furnish him such seat, unless a sudden and unusual influx of passengers rendered this impracticable. It is perfectly clear from all the evidence in this case that the conductor in charge of the train could and should have made provision for seating the appellee. It is equally certain that a proper application of the appellee to that effect provoked not only a refusal from the conductor, but subjected the audacious passenger to an explosion of profane and contemptuous wrath from that official.

That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God, and take courage. Affirmed.

the train without right. Chesapeake & O. Ry. Co. v. Saulsbury, 112 Ky. 915, 66 S. W. 1051, 56 L. R. A. 580 (1902).

Compare Cobb v. Gt. W. Ry. Co., [1894] App. Cas. 419, refusal to delay train to enable passenger to recover stolen money; Henderson v. Louisville, etc., R. Co., 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92 (1887), refusal to stop train to recover money dropped from car window.

## HARDENBERG v. ST. PAUL, M. & M. RY. CO.

(Supreme Court of Minnesota, 1888. 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610.)

GILFILLAN, C. J. Defendant was a common carrier of passengers for hire, maintaining and operating, for that purpose, a line of railway from Minneapolis to Wayzata, on Lake Minnetonka. The plaintiff, for the purpose of going from Minneapolis to Wayzata, entered, at the former place, one of defendant's regular passenger trains for the latter place, which immediately started, and, before plaintiff could look through the cars in the train to find a seat, it was going at a high rate of speed. Upon looking through the train, he could find no seat vacant. At the first opportunity he applied to the conductor to furnish him a seat, and the conductor (as we assume, because the seats were all filled) refused to provide him one. The conductor then demanded his fare, which the plaintiff offered to pay if supplied with a seat, but refused to pay unless supplied with a seat. Up to this the train had made no stop. The conductor then stopped the train, and forcibly put the plaintiff off at a place distant from any dwelling house, more than two miles distant from any flag station, and more than five miles distant from any regular station of defendant. No complaint is made that the conductor, if he had a right to eject plaintiff, used more than the proper amount of force. The only question is, had the conductor a right, under the circumstances, to put plaintiff off at the place where he did; that is, out in the country, at a distance from any station?

In the case of a trespasser on a train—that is, a person wrongfully upon it, as where he enters it intending not to pay the fare, or where he wrongfully refuses to pay the fare when properly demanded—the conductor is not required to put him off at one place rather than another, provided he do not wantonly expose him to peril of serious personal injury. With that qualification, he may put him off at a place other than a station, and is not required to consider his mere convenience. Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349. This plaintiff, however, was not wrongfully on the train. It is, in general, the duty of a railroad company to provide sufficient cars to carry all who have occasion to travel on its line of road. As the law does not require unreasonable things, a single instance, or occasional instances, of insufficiency in the amount of means to travel, caused by a rush of travel not reasonably to be expected by the company, would probably be excused; and the railroad company, like all other common carriers of passengers, must provide those whom it carries with the usual, reasonable accommodations for comfort in traveling, including seats. This is too well established to need citation of authorities.

When this plaintiff, desiring to take passage to Wayzata, found one of defendant's regular passenger trains about to start for that place, he had a right to enter it, assuming that the defendant had done its duty in providing sufficient and suitable accommodations for all having occasion to become passengers on the train. The train started, and had reached a high rate of speed, before he learned that there was not sufficient seats. When he learned that he could get no seat, he had a right to elect either to accept such accommodations as were offered and pay the fare, or to refuse to pay the fare unless he could have the accommodations to which a passenger is entitled. If he elected the latter course, then (inasmuch as he was not entitled to the passage, even though no seat was provided him, without paying fare) it was his duty to leave the train on the first reasonable opportunity afforded him. He could not be expected to leave the train while in motion. A reasonable opportunity to leave it, would have been the stopping it in a suitable and reasonable place. As he had a right to refuse to pay fare unless a seat was provided him, he did not become wrongfully on the train by so refusing. He could become a trespasser only by refusing to leave the train, on a reasonable opportunity being afforded. Such opportunity the defendant was bound to afford unless it chose to carry him without fare. It was the defendant's, not the plaintiff's, fault that a seat was not provided.

The case differs from the Wyman Case. For in that case the refusal to pay fare was wrongful; in this, the refusal, unless a seat was provided him, was rightful. In that case the plaintiff, by the refusal, became a trespasser; in this, he did not. This case is somewhat analogous to Maples v. Railroad Co., 38 Conn. 557, 9 Am. Rep. 434, in which it was laid down that a railroad company, having a right to eject from its train one not a trespasser, must do so at some regular station on its road. That is a reasonable rule, and that the decision was in accordance with the general rule was recognized by this court in the Wyman Case. See, also, Gallena v. Railroad Co. (C. C.) 13 Fed. 116. Order reversed.[36]

[36] The statement of facts is omitted.

See, also, St. Louis, etc., R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558 (1885); Graham v. Manhattan Ry. Co., 149 N. Y. 337, 43 N. E. 917 (1896). For duty to heat car, see Taylor v. Wabash Co. (Mo.) 38 S. W. 304, 42 L. R. A. 110 (1896).

## SECTION 7.—TRANSPORTATION NOT WITHIN THE CONTRACT OF CARRIAGE

### I. WITHOUT ACCEPTANCE

### FORD v. MITCHELL.

**(Supreme Court of Indiana, 1863. 21 Ind. 54.)**

This was an action against a common carrier by steamboat for failure to deliver a box of dry goods. The issues were submitted to the court who found specially that the plaintiff had caused the box in question together with another box to be placed on board the steamboat when she was ready to make her trip; that the boxes were received by the deck hands in such manner that the proper officers of the boat to receive freight must with reasonable attention and diligence have known of them; and that though the other box was duly delivered, the box sued for was never delivered. Judgment for plaintiff. Defendant appeals.

DAVISON, J.[87] * * * The court do not find that the deck hands were authorized to receive freight, nor does it appear that the box was delivered pursuant to any special contract or usage. But it did, in effect, find that the manner of the reception of the box, by the deck hands, was such, that the officers, whose duty it was to receive goods for transportation, must, if they had exercised reasonable attention, care and diligence, have known that the box was in the boat, and have received it. This finding is not, it seems to us, sufficient to charge the carrier. No special contract or usage, applicable to the case, having been found, it should appear, affirmatively, that he or his agents, for the reception of freight, had been expressly notified of the deposit of the box in his steamboat.

This conclusion is fully sustained by the authorities to which we have referred. And, as no such notice has, in this instance, been found by the court, the findings do not support the judgment. * * * Judgment reversed.[88]

[87] The statement is based on facts stated in the opinion. Part of the opinion has been omitted.

[88] Compare Siegrist v. Arnot, 86 Mo. 200, 56 Am. Rep. 424 (1885).

## DALTON'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, 1900. 56 S. W. 657, 22 Ky. Law Rep. 97.)

HOBSON, J. Appellant filed this suit to recover of appellee for the loss of the life of his intestate, and, a demurrer having been sustained to his petition and his action dismissed, has appealed to this court. He alleges that his intestate boarded or entered at Glendale, Ky., a train of appellee usually employed in the transportation of freight, and commonly known as a "freight train"; that this train was proceeding southward; that the fact that his intestate boarded this south-bound train, and was being carried on the train, was well known to appellee's agents and servants in charge of it; that about ten miles south of where he boarded the train, and after it had passed two or more local stations, it collided with another freight train, going north, by reason of the fact that the north-bound train had disobeyed its orders, and failed to stop at a station which it had just passed, where it was ordered by the train dispatcher to take the siding until the south-bound train passed it; and that in the collision his intestate was killed.

As the petition alleges that the train he was on was one that was usually employed in the transportation of freight, and commonly known as a "freight train," containing no averment that it carried passengers, it must be inferred that the train was not one on which passengers were carried; and as it is averred that plaintiff boarded the train at Glendale, and that the servants of appellee knew he was on the train, and permitted him to remain on it until it passed two local stations, there being no averment that he paid fare or had any right on the train, it must be inferred that he was on a freight train without right, and by the sufferance of appellee's servants in charge of it.

It is earnestly insisted for appellant that, notwithstanding this, he may recover, because of the gross negligence of appellee in allowing the two trains to collide. But the trouble with this is that the appellee owed appellant no duty to carry him safely; that he took the risks of the journey when he rode upon its freight train in this way. The only obligation appellant owed to him was not to injure him after knowledge of his danger.

There is no allegation that anything was omitted which might have been done for the intestate's safety after the danger was discovered, and the court properly sustained a demurrer to the petition. Duff v. Railroad Co., 2 Am. & Eng. Ry. Cas. 1; Railroad Co. v. Burnsed, 70 Miss. 437, 12 South. 958, 35 Am. St. Rep. 656; Everhart v. Railroad Company, 78 Ind. 292, 41 Am. Rep. 567; Eaton v. Railroad Co., 57 N. Y. 382, 15 Am. Rep. 513; Condran v. Railway Co., 14 C. C. A. 506, 67 Fed. 522, 28 L. R. A. 749, and note; Railroad Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549. Judgment affirmed.[89]

[89] In Claiborne v. Mo., etc., Co., 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336 (1900), an action by a trespasser, who testified that, while he was

## ILLINOIS CENT. R. CO. v. O'KEEFE.

(Supreme Court of Illinois, 1897. 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68.)

Action on the case by an administratrix to recover for the death of her intestate, O'Keefe. O'Keefe lived at Anna, not far from the railroad. He held a free pass. The evidence showed that one morning, as a vestibuled train was leaving the station, he ran out of his house toward the track and boarded the train after it had left the station and while it was moving at the rate of three or four miles an hour. He got on at the front platform of the baggage car just behind the tender. The vestibule doors at all other car platforms were closed. The conductor, after going through the train from front to rear, came forward to the baggage car to see about the person who had got on the front platform. When the conductor entered the baggage car he saw a freight train coming on the same track, and jumped off through the side door. O'Keefe, still on the platform of the baggage car, was killed in the ensuing collision. The collision was caused by defendant's negligence in the transmission of orders.

CARTWRIGHT, J.[40] * * * At the close of the evidence the defendant asked the court to instruct the jury that such evidence was not sufficient to authorize a verdict for the plaintiff, and that they should find the defendant not guilty. The instruction was refused, and the defendant excepted. * * *

The question is whether these facts fairly tend to establish the relation of passenger and carrier between O'Keefe and the defendant by showing that he had put himself in the care of the defendant as a passenger, and had been expressly or impliedly received and accepted as such by the defendant through any authorized agent. We think that they do not. He did not go upon the train at the station provided for the reception of passengers, and did not take any place provided for the reception, accommodation, or carriage of passen-

seen to be climbing over the tender and the train was in motion, the engineer negligently caused the engine to lurch forward, so that he was thrown to the ground, it was held that for such negligence the railroad would be liable. Conner, J., said: "The principle that every person shall so use or cause to be used his own property, and shall so conduct or cause to be conducted his own business, however legitimate, as to not unnecessarily injure another, is sound as matter of universal application. If the engineer in fact saw appellant, and knew of his perilous position, if it was one, and knew of the danger of causing a sudden jerk or increase in the speed of his engine, considerations of humanity dictated that he should at least use ordinary care to avoid the performance of an act that it was alleged he knew would probably result in injury to appellant, even though such act, under ordinary circumstances, was proper, usual, or customary in the 'proper operation of the train.'" Acc. L. & N. R. Co. v. Kemery's Adm'r, 66 S. W. 20, 23 Ky. Law Rep. 1734 (1902).

[40] The statement of facts has been rewritten, and parts of the opinions omitted.

gers. He did not comply with any of the ordinary customs under which defendant held itself out as ready to receive and carry passengers, or under which they are received or carried.

It is said that he no doubt tried to open the baggage car door, and the inference intended is that he tried to put himself in charge of defendant as a passenger in a proper place. There is no evidence of the supposed fact; and, if there were, it could make no difference. It will certainly not be claimed that defendant was bound to have the baggage car door open so as to give access to its passenger coaches by way of the baggage car; but, even if that were a wrong to him, he could not become a passenger by attempting to get in that door any more than if he had attempted to open one of the vestibule doors, which was locked, and had failed. He had not put himself in the care of the defendant as a passenger. Of course, the fact that the engineer knew that deceased climbed upon the train would not make him a passenger, since an engineer is not authorized to act for the defendant in such a matter, or to accept passengers.

Nor do we think that the mere fact of the conductor knowing that some one had boarded the moving train on the platform between the tender and baggage car, and might still be there, is evidence tending to show that defendant accepted him as a passenger. The conductor did not know who he was, or what he was there for, whether as a passenger or otherwise. As conductor, he performed the usual duties after leaving the station, and had not reached this platform next the tender when the accident occurred. He had done nothing in the matter one way or the other.

The train was moving slowly when O'Keefe climbed on, but that fact is only material on the question of negligence on his part in boarding a moving train. The train had left the station, and there would be no difference, so far as creating a relation of passenger and carrier was concerned, whether he got on there or at some other place between stations where the train was moving slowly. Of course, he might have ridden on the platform in safety but for the collision, and so, also, he might on the engine or tender or elsewhere on the train where passengers are not carried. That fact concerns only the question of negligence, and is not material on the question whether he became a passenger.

As we have concluded that there was no evidence tending to establish one necessary element for a recovery—that the deceased was a passenger on defendant's train—it follows that for such failure of proof the instruction asked should have been given. The judgments of the appellate court and circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

CARTER, J. (dissenting). * * * The jury had the right to find from all the circumstances, including the fact that, after the conductor saw him get on the front end of the baggage car, he went from the other end of that car through the train, taking the fares of passengers,

without saying anything to O'Keefe, and without interfering with him in any way, that he did not object to his riding in that way; that is, to find implied consent on the part of the company. * * *[41]

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## FIRST NAT. BANK OF GREENFIELD v. MARIETTA & C. R. CO.

(Supreme Court of Ohio, 1870. 20 Ohio St. 259, 5 Am. Rep. 655.)

The plaintiff alleged in its petition that it was the owner of a package containing $4,000 in United States notes, which it delivered to its agent, McElroy, to take to Cincinnati, that McElroy for that purpose became a passenger in defendant's train with the money on his person; and that by the defendant's negligence the train was wrecked and burned, McElroy killed, and the money destroyed. On demurrer, defendant had judgment. Plaintiff filed a petition in error.

SCOTT, J.[42] If the facts stated in the petition show the defendant to have been guilty of a breach of contract, or derelict in respect to a legal duty, we think the plaintiff's claim cannot be resisted on the ground that the contract was made, not with the plaintiff, but with an agent acting in his own name, or that the supposed duty was owing to the agent and not to his principal. The bank had the same right to send the notes in controversy by McElroy as a special agent, as it would to have carried them over the same road under the same circumstances through its president, cashier, or any other officer; and McElroy had the same right to carry the notes for the bank, as for himself, had they been his property. * * *

In the able and elaborate argument of counsel for plaintiff, the right to recover is based upon two distinct grounds:

1. That the plaintiff's property being at the time of its destruction where it was lawfully—that is, in the exercise by the plaintiff of a legal right in reference to it—and being, without any fault of the plaintiff, destroyed by the negligence of the defendant, in the management of its own property, a right of action accrues for the damage, by virtue of the maxim, "sic utere tuo, ut alienum non lædas."

2. That the duty which the defendant, as a common carrier of passengers, owed to McElroy to exercise care and skill in transporting

[41] See Carrier and Passenger, by Professor J. H. Beale, 19 Harv. Law Rev. 250, 259–262.

In Railroad v. Bogle, 101 Tenn. 40, 46 S. W. 760 (1898), a passenger on a cattle train, stopped on a siding, left the caboose to look after his cattle. The train moved, and, for fear he could not reach the caboose, he got upon the engine, but jumped off at the order of the engineer and was hurt. It was held that when on the engine he was not entitled to the care due a passenger, and that no recovery could be had, except for willful, wanton, or intentional injury. Compare Whitley v. So. Ry. Co., 122 N. C. 987, 29 S. E. 783 (1898).

[42] The statement of facts has been rewritten, and parts of the opinion omitted.

him safely, extends to all articles of value which, at the time, he had lawfully in his possession, or about his person, so as to entitle him, or its owner, in case of injury resulting from a breach of that duty, to recover compensation for the damage done to such property.

As to the first of these propositions, we do not call in question the justice or soundness of the maxim upon which it is supposed to rest. The only doubt is as to its proper application to the present case. * * * Damage resulting from the negligence of another will not in all cases constitute a cause of action. Should A. through negligence burn his own house, and with it the property of B., placed therein without the knowledge or consent of A., we apprehend B. could not hold A. liable for the loss. We can not, therefore, ignore the fact, that the carrying of the money in defendant's car was an essential element in the circumstances occasioning the loss, nor the fact that it was so carried by a person whose only right to be there was in virtue of his character as a passenger. To ascertain the rights of McElroy as such passenger, and the obligations and liabilities of the defendant as a common carrier, in respect of the property destroyed, necessarily requires a consideration of the second proposition, which bases the right to a recovery on the relation subsisting between McElroy and the defendant, at the time of the loss, and the duties and obligations which that relation imposed on the defendant.

As we have said, the relation subsisting between McElroy and the defendant was that of passenger and common carrier, and it was in virtue of that relation that plaintiff's money was brought into defendant's car, and became exposed to the peril which caused its loss. What, then, was the contract between the defendant, as a common carrier of passengers, and McElroy, and what was the extent of the obligations imposed on the defendant by law, in virtue of that contract?

Upon well-settled principles the defendant became bound in consideration of the fare paid by McElroy, to use the highest degree of diligence and care in transporting him to his place of destination. And this contract for the carriage of his person necessarily included the wearing apparel which accompanied his person, such reasonable sum of money as might be in good faith carried wth him for the expenses of the journey, together with all such articles, to a reasonable extent, at least, as are ordinarily carried or worn upon the person for purposes of personal use, convenience, or ornament; and we agree with counsel for plaintiff that the contract also included the carriage of "his baggage delivered to the defendant as such to be carried, to the extent of an ordinary and reasonable wardrobe for one in his station in life, together with such articles as are usually found in the paraphernalia of a traveler."

But the notes for the loss of which this action is brought can neither be regarded as a part of the passenger's baggage, nor as money intended to defray the expenses of the journey. The statements of the petition show that the notes were simply being transmitted, for

business purposes, from Greenfield to Cincinnati, and were not intended to be used by the passenger for defraying the expenses of his journey or otherwise. The trip may have been undertaken on account of the money, but the money was not carried on account of the trip. Nor was the defendant entrusted with the custody of these notes, or specially charged with any care or oversight in respect to them. They remained in the exclusive custody and control of McElroy. And as they were clearly not included in the contract for the transportation of the passenger and his baggage, and were not subjected to the custody of the carrier, it is difficult to see how he can be held liable for a want of care over them.

We do not call in question the right of a passenger to carry about his person for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for their transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants is concerned. For this secret method of transportation would be a fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of parcels never delivered to him for transportation, and of which he has no knowledge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself. * * *

It is claimed in argument that a common carrier of passengers has no reason to complain if he be held responsible for a loss of property resulting as a direct consequence from the want of that degree of care which the law requires him to exercise toward the persons of his passengers. But in the case of a breach of contract, the delinquent party can only be held liable for such damages as are so far the natural and direct result of the breach that they may reasonably be presumed to have been in the contemplation of the parties when the contract was entered into. Now admitting the breach of contract with McElroy, the question is as to the extent of the liability incurred. It would seem from the petition that the defendant dealt with McElroy only as an ordinary passenger, seeking transportation for himself and ordinary baggage. He could not reasonably suppose that the defendant, by selling him a ticket and agreeing to carry him and his baggage with due care, contemplated incurring a liability in respect to a large sum of money, of which defendant had no knowledge, and which he was carrying solely for the purpose of transferring it from one point to another.

The case made by the petition is not one in which the plaintiff's property has been destroyed by an act of positive misfeasance in the nature of a forcible trespass. The defendant is not charged with its

wilful destruction, nor with such gross negligence as would approximate to wantonness. Both the petition and the argument of counsel proceed upon the theory that any negligence which would render a carrier of passengers liable for personal injury sustained by a passenger, will make him, at the same time, liable for all damages resulting therefrom to any property which the passenger may have lawfully with him or about his person at the time. The doctrine thus broadly stated is, we think, unsustained by authority, and cannot be maintained upon principle. In effect, it ignores the distinction between the property covered by the contract for transportation and that which is outside of it. * * * Judgment affirmed.[43]

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## II. IGNORANCE, MISTAKE, AND FRAUD

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### LITTLE v. BOSTON & M. R. R.

**(Supreme Judicial Court of Maine, 1876. 66 Me. 239.)**

Case against the defendants as common carriers, for the loss of a box containing jewelry goods of the alleged value of $1,700, received by the defendants at Boston, November 28, 1871, marked "H. A. Osgood, Lewiston, Maine."

Plea, general issue.

The evidence showed that the box declared on, in good order and plainly directed, was delivered in Boston to the plaintiffs, doing business under the name of the Kennebec & Boston Express, by the New York express company to whom the plaintiffs paid the expense of 40 cents, the smallness of the charge indicating that it contained goods of ordinary value only; that the plaintiffs delivered it to the defendant company in Boston, to be carried with other freight at the rate of $5 per ton; that neither the plaintiffs nor the defendants knew what the box contained; that the custom of the plaintiffs was to send their valuable articles in a strong chest by an express messenger; that the charge on this box was 30 cents from Boston to Lewiston; that if the value had been known it would have been about $2.50; that before the freight car arrived at Lewiston the door of it was seen to be off and gone, and when it arrived there this box was missing. The plaintiffs put into the case the record of a judgment in Androscoggin county, rendered February 3, 1874, against them in behalf of Henry A. Os-

[43] Acc. Weeks v. N. Y., etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104 (1878); Henderson v. Louisville & N. R. Co., 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92 (1887); Knierem v. N. Y. C. R. Co., 109 App. Div. 709, 96 N. Y. Supp. 602 (1905); Levins v. N. Y., etc., R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434 (1903), money stolen by railroad porter. See, also, Hillis v. Chicago, etc., Co., 72 Iowa, 228, 33 N. W. 643 (1887).

good, on a verdict found at the September term in 1872 for $1695; cost taxed $63.77.

The case was submitted to the full court, to render such judgment as the law and facts require, and to assess the damages.

APPLETON, C. J.[44] * * * The defendants are common carriers, and subject to the responsibility and liabilities imposed upon them as such. "The common carrier is responsible for the loss of a box or parcel, though he be ignorant of its contents, or though those contents be ever so valuable, unless he make a special acceptance." 2 Kent, Com. 603; Sager v. P., S. & P. Railroad, 31 Me. 228, 1 Am. Rep. 659. Such is the general rule; but if the owner is guilty of fraud or imposition as by fraudulently concealing the value of the parcel, or in any way leading the carrier to regard it as of little value, he cannot hold him liable for the goods lost. These plaintiffs cannot be deemed guilty of fraud in concealing the value of the box in controversy, when its contents were unknown.

The freight may depend upon the value of the article to be carried. When the article is of extraordinary or unusual value, the carrier would well be entitled to a higher rate of compensation, inasmuch as he might be reasonably held to a greater degree of care. The carrier therefore has a right to inquire as to the value of the article entrusted to him for carriage, and the owner is bound to answer truly. If he answers falsely, he will be bound by such answer. But if no inquiries are made, he is not required, in the absence of fraud, to state the value of the goods delivered to the carrier. Phillips v. Earle, 8 Pick. (Mass.) 182; Brook v. Pickwick, 4 Bing. 218. The defendants, however, omitted the precaution to make any inquiry as to value; and it was for them to do it. Walker v. Jackson, 10 Mees. & W. 168; Angell on Carriers, § 264. * * *

The defendants' liability is fully established. The measure of damage is the value of the goods at the place of delivery. Perkins v. P., S. & P. Railroad, 47 Me. 573, 74 Am. Dec. 507; 2 Redfield on Railroads (5th Ed.) 198. The plaintiffs show by the records of the court, and by other evidence, that judgments have been rendered against them in the courts of this state for the value of the goods in the box lost by the defendants. We must presume that the damages in those cases were assessed upon legal principles. They will, therefore, with interest, constitute the amount for which judgment must be rendered in favor of these plaintiffs.

Judgment for the plaintiffs.[45]

[44] Parts of the opinion are omitted.

[45] "The case of Kenrig v. Eggleston, Aleyn. 93, was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying, 'there was a book and tobacco in the box,' when in truth it contained £100 in money, besides. Roll, J., thought the carrier was nevertheless liable for a loss by robbery; 'but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages.' The jury, however, found the whole sum (abating the carriage) for the plaintiff, quod durum videbatur circum-

## EVERETT v. SOUTHERN EXPRESS CO.

(Supreme Court of Georgia, 1872. 46 Ga. 303.)

McCAY, J.[46] * * * The judgment of the court granting the new trial is excepted to; not the reasons he gave, nor the grounds he put it upon, but the order, decision or judgment of the court, to wit: setting aside the verdict [for plaintiff] and granting a new trial. If that judgment was good and right, for any reason contained in the record, it ought to stand. The judgment is one thing, the reasons

stantibus. In Gibbon v. Paynton, 4 Burr. 2298, Lord Mansfield said, this was a case of fraud, and he 'should have agreed in opinion with the circumstantibus.' In Tyly v. Morrice, Carth. 485, two bags of money sealed up were delivered to the carrier, saying they contained £200, and he gave a receipt for the money. In truth the bags contained £450, and the carrier, having been robbed, paid the £200; and in this action brought to recover the balance, the Chief Justice told the jury that 'since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant.' And the same point was decided in another action against the same carrier. In Gibbon v. Paynton, 4 Burr. 2298, £100 in money was hid in hay in an old nail bag, which fact the plaintiff concealed from the carrier; and the money having been stolen, the court held that this fraud would discharge the defendant. In the case of Orange Co. Bank v. Brown, 9 Wend. [N. Y.] 85 [24 Am. Dec. 129], the agent of the plaintiffs put $11,000 in bank bills in his trunk, and delivered it to the captain of the steamboat as his baggage. The court held that the term baggage would only include money for the expenses of traveling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiff's agent was a virtual concealment as to the money, that 'his representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain.' The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly. Phillips v. Earle, 8 Pick. [Mass.] 182." Bronson, J., in Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455 (1838).

"If any merchant or merchants contract with any managing owner of a ship or vessel to load upon freight certain bales or bundles, or some other certain articles, and the merchants shall place or cause to be placed in those packages, bales, bundles, or chests, or whatever the goods may be, in the midst of one or all of them anything secretly, such as gold, silver, coin, pearls, silk, or other precious goods or merchandise, whatever they may choose, and what may be within those packages, bales, bundles, chests, or other goods, which they have inserted secretly in them, they shall not have told or shown when they loaded the ship to the managing owner, or to the mate, or to the watch, or to the ship's clerk of that ship in which they have placed them [there shall be no liability in case of jettison to contribute in general average for the value of the unknown articles]. * * * Still more, if those goods or merchandise above mentioned shall be lost by fault of the managing owner of the ship, or the ship's clerk, they are not liable to make any compensation to him to whom they belong, except so much as he shall have made it understood when he put the goods on board, because at times there are certain merchants who, if a man were to believe all that they say or make oath to, in case that any package were lost by any of the above causes, would say that in that package they had put valuables that were worth a thousand marks of gold or silver; and for that reason no one is responsible to a merchant except for that which at the loading of it he shall have declared to one of the parties above enumerated. * * *" Consulate of the Sea, c. 212. See Rev. St. § 4281 (U. S. Comp. St. 1901, p. 2942), post, p. 472.

[46] The statement of facts and part of the opinion are omitted.

given for it another. It is with the judgment this court has to do. Ought that to be affirmed or reversed? In our judgment this verdict is not sustained by the evidence. This court has in effect decided that very thing, when the case was before it at Milledgeville, in 37 Ga. 688. The evidence there was the same as here, with the single exception that the negro boy who carried the box to the express office now testifies that he did not open the box. The evidence as to the mode in which this valuable pin was put up is the same.

The point of that decision was, that the carrier has a right to know the value of the article he is asked to carry, that he may take the better precaution to prevent persons from stealing it from him, or to prevent its loss from carelessness. An article of small value presents few temptations to the thief. The company may safely entrust it to less trustful agents, and take less pains to protect and preserve it. Valuable articles ought to be, and usually are, put in a safe and are delivered by the most trustworthy agents into the hands of the consignee. And for this extra care and risk a higher price is charged. The proof here shows that a small article of great value was, either designedly or carelessly, put in a common paper box, tied up with a string, and its value, either designedly or carelessly, concealed from the knowledge of the carrier. Who knows why? The evidence does not show; but if there was no special design—if the extra charge was not the thing sought to be got rid of, the gross negligence of the consignor amounts to fraud. It misled the carrier; it put him off his guard. He had a gem in his custody, a thing to be specially cared for, and he did not know it; and this want of knowledge was the fault of the consignor. No person of ordinary prudence would send by a messenger a valuable article like this without special notice of its value, and were this defendant an ordinary carrier, we doubt if it would be possible to get a verdict against it on such facts. Unfortunately there is not the same carefulness to do only strict justice in cases where rich corporations are parties. But the law knows neither the rich nor the poor as such—justice to both is its rule.

We feel ourselves bound by the decision of this court in this case, in any view of it, though we agree that it is right, and would, were the case now first before us, give the same judgment. We think, therefore, that the verdict ought to have been set aside as illegal. Judgment affirmed.[47]

[47] See, also, So. Ex. Co. v. Wood, 98 Ga. 268, 25 S. E. 436 (1896); Bottum v. Charleston, etc., Ry. Co., 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. Rep. 610 (1905); Relf v. Rapp (Pa.) 3 Watts & S. 21, 37 Am. Dec. 528 (1841); Hart v. Pa. Co., 112 U. S. 331, 340, 5 Sup. Ct. 151, 28 L. Ed. 717 (1884); Oppenheimer v. U. S. Ex. Co., post, p. 400.

"The principle upon which the carrier is relieved from liability, under some of the decisions of this court, as already stated, is that there was a fraud upon the carrier; but there is another good reason: The carrier did not undertake to carry anything but household goods; wearing apparel was not included in the contract; and hence the carrier was only bound to carry such goods as the shipper represented to be contained in the boxes and bundles,

## MACROW v. GREAT WESTERN RY. CO.

(Court of Queen's Bench, 1871. L. R. 6 Q. B. 612.)

COCKBURN, C. J.[48] This was an action brought by the plaintiff for compensation for the loss of luggage lost while traveling as a passenger on the defendants' railway. At the trial before my Brother Blackburn the question turned on how far the articles lost came within the description of ordinary passengers' luggage. A verdict passed for the plaintiff. * * *

The plaintiff had recently returned from Canada, with the intention of settling in England, but had not yet provided himself with a home. Amongst other articles which were in the box were six pairs of sheets, six pairs of large blankets, and six large quilts, which had formed part of his household goods in Canada, and which he intended to be again part of his household goods when he should have provided himself with a home. * * *

By the act of Parliament by which the company is constituted it is provided that passengers by the railway shall be entitled to have a fixed quantity of ordinary luggage, according to their respective classes, conveyed with them free of charge. See 9 & 10 Vict. c. 91, § 63.

The question for our decision is whether the articles of bedding hereinbefore referred to can be considered as ordinary passengers' luggage.

and which it contracted to carry." Blandford, J., in Charleston, etc., Ry. Co. v. Moore, 80 Ga. 522, 5 S. E. 769 (1888).

"I wish to add here a remark, that when the words 'imposition,' 'deception,' 'fraud' are used, it is because they are found in the books treating on this matter, and not as imputing to the plaintiffs any motive or design inconsistent with complete mercantile honor and fair dealing. It would be more accordant with the idea meant to be conveyed to use the language suggested by reputable writers on insurance, and to say that a concealment without design is a failure to observe an implied condition that the contract for carriage is free from misrepresentation or concealment. It is proper also to add that while such a concealment, under such a contract as there is in this case, relieves the carrier from liability for a loss occurring from ordinary negligence, we do not now hold that he will be thereby thus relieved, where his acts or those of his servants have amounted to a misfeasance or abandonment of his character as carrier." Folger, J., in Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442 (1875).

With the principal case, compare Walker v. Jackson, 10 Mees. & W. 161 (1842), which holds that a ferryman liable for the loss of a carriage given into his custody is not relieved from liability for the loss of boxes of jewelry under its seat by the shipper's failure to inform him of their presence. Compare, also, Shaw v. Gt. Western Ry. Co., [1894] 1 Q. B. 373, 380.

See, also, Baldwin v. Liverpool, etc., Co., 74 N. Y. 125, 30 Am. Rep. 277 (1878), carrier entitled to agreed freight only on a box which without its knowledge contained bonds worth $1,000,000; Smith v. Findley, 34 Kan. 316, 8 Pac. 871 (1885), entitled to extra freight where, under a contract to carry household goods, other goods were shipped for which it had a higher rate; U. S. Ex. Co. v. Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600 (1896).

[48] The statement of facts and parts of the opinion have been omitted.

The impossibility of traveling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passengers, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger. Under the older system of traveling by stage coaches, canal boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various acts of Parliament under which railways have been established.

The provision fixing the amount of luggage which the traveler shall be entitled to take with him free of charge has a twofold object: First, that of securing to the traveler the conveyance of a reasonable amount of luggage; secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute.

Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the Railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveler.

The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been coextensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in Talley v. Great Western Ry. Co., L. R. 6 C. P. 44, in which case other considerations arise.

On the other hand, the obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what properly falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely irrespectively of negligence, attaches.

It is necessary to state the proposition with this qualification; for,

as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier, it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss though not arising from his negligence. [The learned judge here reviewed certain cases.] * * *

While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles unconnected with the personal use and convenience of the traveler, or, as in Hudston v. Midland Ry. Co., L. R. 4 Q. B. 366, of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying.

On the other hand, the term "ordinary luggage" being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier.

The articles as to which the question in the present case arises consisted of bedding. Now, though we are far from saying that a pair of sheets, or the like, taken by a passenger for his own use on a journey, might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description, intended, not for the use of the traveler on the journey, but for the use of his household when permanently settled, cannot be held to be so.

We are, therefore, of opinion that the rule to reduce the damages in respect of these articles must be made absolute.

Rule absolute.[49]

[49] In Britten v. Great Northern Railway Co., [1899] 1 Q. B. 243, Channell, J., said: "It seems to me that, overriding it all, in the word 'luggage' there is involved the idea of a package or something of that sort; and it seems to

## DUNLAP v. INTERNATIONAL STEAMBOAT CO.

(Supreme Judicial Court of Massachusetts, 1867. 98 Mass. 371.)

Actions of tort against a common carrier for loss of a valise taken as baggage, and containing, among other articles, money belonging to each of the plaintiffs.

The judge instructed the jury, substantially in accordance with the defendant's request, that for money in the valise in excess of a reason-

me that an article which is taken, as it were, loose, as a bicycle is taken, is subject to rather different considerations. I think that Mr. Russell is right in saying that there must be added to the things which are not luggage things of a special character, which require special care, and are not packed in this way. There are many small articles, such as musical instruments, for instance, or a gun apart from its case, which are sometimes carried by passengers. I do not think that a passenger could require articles of that kind to be taken as luggage, loose and without package, though it may be that a gun in a gun case packed up would be a package and ordinary luggage. * * * When it is tendered to the company unpacked, it seems to me they are entitled to say, 'This sort of thing is not what we are called upon to carry as personal luggage;' and that is, I think, the result of the case of Macrow v. Great Western Railway, L. R. 6 Q. B. 612. I think that is sufficient to justify me in holding that a bicycle is not personal luggage."

Acc. Missouri v. Missouri Pac. Ry. Co., 71 Mo. App. 385 (1897).

In Runyon v. Central R. Co. of N. J., 61 N. J. Law, 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711 (1898), it was held that a railroad may refuse to permit a passenger returning to his home in the suburbs to bring into its passenger car a parcel bought in the city and carried in his hand, which he would not be entitled to have carried as baggage, and that a 10-pound package of nails was such a parcel. But it was also held that if it has been usual to permit passengers to carry such parcels, so that they have formed a practice of doing so, the permission can only be withdrawn after reasonable notice.

It has been held: That a pair of dueling pistols on an Illinois river steamboat in 1851 were proper baggage. Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483 (1852). Otherwise as to two revolvers. Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212 (1870). And as to a single pistol. Cooney v. Pullman Co., 121 Ala. 368, 25 South. 712, 53 L. R. A. 690 (1899). That material bought in New York for a dress for a passenger's wife was baggage; otherwise, as to material for a dress for his landlady. Dexter v. Syracuse R. Co., 42 N. Y. 326, 1 Am. Rep. 527 (1870). That the manuscript books of a student on his way to college were baggage. Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692 (1868). But that a client's title deeds, taken by his attorney to produce in evidence on a trial, were not "ordinary luggage," under a statute defining the passenger's rights. Phelps v. London & N. W. Ry. Co., 19 C. B (N. S.) 321 (1865). That tools of a mechanic are baggage, but only when reasonable in quantity and of a kind usually carried for personal use. Kansas City, etc., R. Co. v. Morrison, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252 (1886); Missouri, etc., Co. v. Meek, 33 Tex. Civ. App. 47, 75 S. W. 317 (1903). That a traveling salesman's catalogue was baggage. Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619 (1889); Gleason v. Transportation Co., 32 Wis. 85, 14 Am. Rep. 716 (1873). But that samples used by him in making sales were not. Ill. Central R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316 (1903); Kansas City, P. & G. R. Co. v. State, 65 Ark. 363, 46 S. W. 421, 41 L. R. A. 333, 67 Am. St. Rep. 933 (1898). For other cases, see Carriers, 9 Cent. Dig. §§ 1520–1528, 4 Dec. Dig. § 391.

For the liability of an express company carrying from a railroad station to the owner's residence a trunk containing articles not baggage, see Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276 (1874).

able amount for traveling expenses the defendant would be liable if the valise were lost by its gross negligence or fraudulently appropriated by any person in its regular employment while on duty in or about the baggage. The jury gave verdicts for the full value of the property lost. The judge reported the case for revision, the verdicts to be set aside, affirmed, or amended as law or justice might require.

BIGELOW, C. J.[50] * * * On careful consideration of the instructions embraced in the defendants' prayer and those given by the court to the jury, we are led to the conclusion that neither of them contained a correct statement of the rules of law applicable to the facts in proof. It was shown at the trial, and on this part of the case there was no controversy between the parties, that there was but a single article of luggage delivered to the defendants; that this was a valise such as is commonly used by travelers for the transportation of wearing apparel and other personal effects; that the whole of the contents, except a portion of the money contained in it, belonged to one of the plaintiffs, by whom it was delivered to the defendants' agent; and that the other plaintiff had no valise or trunk, and no wearing apparel or other articles of personal use in his possession or keeping, except such as were on his person when he went on board. In this state of the evidence, the question arises as to the extent of the defendants' liability for the loss of the valise. It is conceded that they are responsible in damages to the plaintiff who owned the valise, for the value of the wearing apparel and the other articles of personal use contained in it, and also for such an amount of money therein as was sufficient to defray his traveling expenses on the journey which he had undertaken. The controversy is as to their further liability for the residue of the money contained in the valise. * * *

In regard to carriers of passengers, there can be no doubt that persons who enter into contracts with them to transport themselves and their luggage, nothing being said as to the contents of the parcels which are delivered for carriage, and these being in the form of trunks or valises such as are commonly used for clothing and other personal effects, represent by implication to the carriers that they contain no articles or property not properly included within this class or description, and such as a traveler may carry with him as part of his luggage, and for which he can hold the carrier responsible under his contract. If other and different articles of greater value are contained in such trunks or valises, it is a disguise of their true nature and value, and operates as an unfair and fraudulent concealment of them which absolves the carriers from liability therefor in case of loss. Nor is this all. In such a case, the owner can prove no contract for the transportation of any articles other than wearing apparel and other

[50] The statement of facts has been rewritten, and parts of the opinion omitted.

ordinary personal effects and an amount of money reasonably sufficient for the payment of traveling expenses.

What is the contract into which the carrier enters when he receives a passenger? It is only to transport him safely, together with such articles and money as are properly contained in the luggage which he brings with him; but he does not contract to transport anything which he may bring with him in the shape of luggage, when in fact it is not properly such, but merchandise or money which he cannot ask the carrier to receive in that form. Therefore it is that he cannot be held liable at all, not even for gross negligence, for the loss of any articles not embraced within the contract. He did not agree to receive or transport money beyond a certain amount, or merchandise of any kind; and he cannot be held liable for any, even the smallest degree of care of that which he did not agree to take into his possession and keeping.[51] * * * These principles are decisive of the rights of the parties to these actions.

The only contracts into which the defendants are shown to have entered with the plaintiffs are for the carriage of one of them with his luggage, and of the other without any luggage. To the former they are liable only for the sum found by the jury to be the value of his wearing apparel and personal effects, and for the sum of money contained in his valise necessary to defray his traveling expenses. To the other plaintiff they are not liable at all, because he is not shown to have made any contract with them to transport luggage. The money belonging to him in the valise of the first plaintiff cannot be recovered. Of its existence the defendants had no knowledge. It was concealed from them by being put into luggage which was delivered to and received by them as belonging to one passenger only. It was as such that they agreed to carry it. It was in effect a concealment of its real value to put into it a larger amount of money than was sufficient for the expenses of a single passenger. This enhanced the risk assumed by the defendants, without their knowledge. It exposed them to the hazard of incurring, by the loss of the luggage

[51] Acc. Great Northern Ry. Co. v. Shepherd, 8 Ex. 30 (1852); Michigan Central R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248 (1874); Toledo, etc., R. Co. v. Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813 (1900); Missouri, K. & T. R. Co. v. Meek, 33 Tex. Civ. App. 47, 75 S. W. 317 (1903), carrier holding as warehouseman; Choctaw, O. & G. R. Co. v. Zwirtz, 13 Okl. 411, 73 Pac. 941 (1903), delay in delivery; Yazoo & M. V. R. Co. v. Georgia, etc., Co., 85 Miss. 7, 37 South. 500, 67 L. R. A. 646, 107 Am. St. Rep. 265 (1904), delay in delivery; Mexican Cent. Ry. Co. v. De Rosear (Tex. Civ. App.) 109 S. W. 949 (1908). But see Trouser Co. v. Railroad, 139 N. C. 382, 51 S. E. 973 (1905).

In Great Northern Ry. Co. v. Shepherd, supra, Parke, B., said: "Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that he was not carrying luggage, and therefore the loss must be borne by him."

Acc. Pardee v. Drew, 25 Wend. (N. Y.) 459 (1841); Mich. Cent. R. Co. v. Carrow, supra. Compare Wilkinson v. Lancashire, etc., Ry., [1907] 2 K. B. 222.

of one passenger, a heavier liability than they had ever agreed to assume.

It is obvious that this was a practical fraud on the defendants. Nor can we see any limit to the amount of liability which might be thus imposed on carriers of passengers, without notice to them, if they can be held to be chargeable in this action beyond the amount of money which one person might properly carry. If a single passenger could carry at their risk the money of another fellow passenger in his own valise or trunk, he might in like manner render them liable, in case of the loss of his luggage, for the money of any number of passengers, however large.

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## ALLING v. BOSTON & A. R. CO.

**(Supreme Judicial Court of Massachusetts, 1879. 126 Mass. 121, 30 Am. Rep. 667.)**

MORTON, J.[52] * * * The plaintiffs offered to show "that a large part of the defendant's business consisted in transporting a large class of passengers known as commercial travelers, with trunks like this, containing merchandise of great value, and that these trunks are known as sample or merchandise trunks, and are of special construction, and in the course of that business the commercial travelers purchase tickets for the ordinary passenger trains and receive checks for their said trunks, and the defendant undertakes to transport the traveler and trunk accordingly for the price of the ticket."

The court properly rejected this evidence. The same evidence in substance was offered and rejected in Stimson v. Connecticut River Railroad, 98 Mass. 83, 93 Am. Dec. 140.

It would undoubtedly be competent for a railroad corporation to agree to transport, at its risk, merchandise by a passenger train for the price of the ticket sold to the passenger. And if the defendant had made such an agreement specially with Kerr, or if it had by notice or otherwise made a general agreement that commercial travelers might carry merchandise upon passenger trains at its risk, it might be liable in this action. But the offer of proof does not go far enough to show such an agreement.

The fact that commercial travelers or others are accustomed to carry merchandise in passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carriers, will not render them liable for such merchandise. The travelers carry such merchandise at their own risk. The established rule of law which limits the responsibility of the carrier, upon the contract implied by the sale of a ticket to a passenger to the proper personal baggage of such passenger, cannot be annulled, and the liability of the

[52] The statement of facts and part of the opinion have been omitted.

carrier enlarged, without proof of an agreement to that effect entered into by the carrier.

For these reasons, we are of opinion that, upon the evidence in this case, the jury would not be justified in finding the defendant liable either in contract or tort.

Plaintiffs nonsuit.[53]

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## ST. JOSEPH & W. R. CO. v. WHEELER.

(Supreme Court of Kansas, 1886. 35 Kan. 185, 10 Pac. 461.)

Action by an administrator against a railroad company to recover damages for negligently causing the death of his intestate, a boy named Frank Wheeler. It appeared at the trial that, while defendant's construction train with caboose attached was being loaded with earth to be carried to another point on the line for the repair of the roadbed there, Wheeler came up and, learning where the train was going, asked permission to ride. The conductor consented, and Wheeler rode with trainmen in the caboose. He was killed in a collision with a freight train caused by defendant's negligence. Plaintiff had a verdict.

JOHNSTON, J.[54] (after stating the facts). * * * One of the questions raised is that there was no correspondence between the pleadings and the evidence. The point is made that the plaintiff alleged that Frank Wheeler was a passenger—a term which it is claimed implied that Frank Wheeler was traveling in a public conveyance by virtue of a contract, express or implied, with the carrier, as the pay-

[53] Acc. McKibbin v. Great No. Ry. Co., 78 Minn. 232, 80 N. W. 1052 (1899); Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316 (1903). Compare McKibbin v. Wis. Cent. Ry., 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. Rep. 689 (1907).

In the following cases where a baggagemaster, though against instructions, received, for transportation as baggage, trunks which he knew to contain merchandise, the carrier was held liable as for baggage: Central Trust Co. v. Wabash R. Co. (C. C.) 39 Fed. 417 (1889); St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212 (1895). And see Hannibal R. R. v. Swift, 12 Wall. 262, 20 L. Ed. 423 (1870); Talcott v. Wabash R. R. Co., 159 N. Y. 461, 471, 54 N. E. 1 (1899). It has been held otherwise if the passenger knew of the instructions. Weber Co. v. Chicago, etc., Co., 113 Iowa, 188, 84 N. W. 1042 (1901). And even if he did not know. Blumantle v. Fitchburg R. Co., 127 Mass. 322, 34 Am. Rep. 376 (1879).

In Cahill v. London & N. W. Ry. Co., 13 C. B. (N. S.) 818 (1863) Cockburn, C. J., said: "The question, therefore, comes to this: Was there knowledge on the part of the company that the box which the plaintiff was carrying with him as personal luggage in fact contained merchandise? * * * It is true that the package bore the semblance of a package of merchandise, and it was marked 'Glass.' But many packages which do not contain merchandise are so marked in order to secure their being handled with more than ordinary caution. It is not found in the case that the company or their servants had any knowledge on the subject; nor do I think we can assume it is a legitimate conclusion from the facts as stated."

[54] The statement of facts has been rewritten, and parts of the opinion omitted.

ment of fare, or that which is accepted as an equivalent therefor, while the evidence offered showed that he was carried on a train not designed for passengers, that no fare was collected or expected to be paid, and therefore that he did not stand toward the company in the relation of a passenger. This is one sense in which the term is used, but not the only one. It is commonly applied to any one who travels in a conveyance, or who is carried upon a journey, irrespective of the character of the conveyance or of compensation to the carrier.

While the plaintiff alleged that Wheeler was carried as a passenger, he nowhere averred that he was carried for hire, nor can it be said that the petition was framed upon the theory that there was a contract relation between deceased and the company. It was rather upon the theory that he was not a trespasser upon the defendant's train, and it is specially alleged that he was upon the train with the knowledge and consent of the conductor. From this averment it is manifest that the pleader did not rely upon any agreement between the company and Wheeler, and did not intend to hold the company to extraordinary care, as it would be held in carrying persons who were passengers in a strictly legal sense; but rather, that as Wheeler was upon the train with the consent of the conductor, he was not wrongfully there, and the company owed him the duty of ordinary care.

The action was founded upon the neglect of the company and not upon the breach of a contract; and allegations of the relation which he occupied toward the company are only material for the purpose of determining and fixing the grade of care owing to him by the company. As we interpret the petition, it did not allege that the relation of carrier and passenger existed by reason of an agreement between the deceased and the company, and therefore that there was no substantial variance between the pleadings and the evidence.

A series of instructions were prepared by the railroad company and disallowed by the court, and their refusal is assigned as error. Most of them in effect instructed a verdict in favor of the defendant, and asserted that the company cannot be held liable for injury to one who rides upon a construction train with the consent of the conductor, and who is not a passenger in the ordinary sense. They were properly refused. We concur with the view of the law taken by the trial judge where he states that:

"Under the admitted facts and the evidence in the case, the said Frank Wheeler was not a trespasser upon the defendant's train, although he was not in legal contemplation a passenger. A common carrier of passengers is bound to exercise extraordinary care towards its passengers, and is liable for slight negligence, but it does not owe the same degree of care to a person on one of its vehicles or trains, who does not stand in the relation of a passenger. To such persons a carrier owes only the duty of ordinary care, which is that degree of care which persons of ordinary prudence would usually exercise under like circumstances."

It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company, for two reasons: First, that the conductor had instructions not to carry passengers on the construction train; and second, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instruction. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employee, the argument made by counsel might apply. * * *

As the charge given fairly presented the law of the case to the jury, the errors assigned will be overruled, and the judgment will be affirmed.

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## TOLEDO, W. & W. RY. CO. v. BROOKS.

(Supreme Court of Illinois, 1876. 81 Ill. 245.)

Writ of error to the circuit court of Champaign county.

This was an action on the case, by Julia A. Brooks, administratrix of the estate of William H. Brooks, deceased, against the Toledo, Wabash & Western Railway Company, to recover damages for causing the death of plaintiff's husband and intestate, through negligence. A trial was had, resulting in a verdict and judgment in favor of plaintiff, for $3166.

WALKER, J.[55] * * * It is urged that the court erred in refusing to give the ninth or some one of the other instructions asked by plaintiff in error, but refused by the court. That instruction asserts that if deceased knew that the regulations of the company prohibited persons from traveling on the road without a ticket or the paying of fare, and if, after being so informed, he went on the train, and by arrangement with the conductor, was traveling without a ticket or paying his fare, deceased, in such case, would not be a passenger, and the company would not be liable for the negligence of their officers. In some form, all these refused instructions present this question.

[55] Part of the opinion is omitted

Defendant in error insists that this case is governed by that of Ohio & Mississippi Railroad Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336. In that case the passenger had been in the employment of the road, and was neither prohibited from getting on the train, nor informed that it was against the rules for him to do so without a ticket or the payment of fare. Again, the company, in that case, seems to have owed the plaintiff for labor, which would have enabled them to deduct the amount of fare from the amount owing him. It was there said, that if a person was lawfully on the train, and injuries ensued from the negligence of the employés of the company, the passenger thus injured might recover.

On the part of plaintiff in error it is urged that railroad companies, being liable for the want of care of their officers by which passengers suffer injury, must have the power to make all reasonable regulations for the government of their employés, and the power to enforce them; that it is a reasonable regulation which prohibits persons from traveling upon their roads without purchasing a ticket or paying fare; that a person going on their road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road, and the company should not be held responsible for an injury received by such person; that where a person actively participates in the violation of such a rule intentionally and knowingly, he does not occupy the same relation to the road as had he not known of the rule or not done any act to induce its violation.

It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employés of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit. In this case the evidence tends strongly to show that both defendant in error and her husband had money more than sufficient to pay their fare to Danville, and a considerable distance beyond that place. If this be true, and defendant in error swears they had, then they were engaged in a deliberate fraud on the company, no less than by false representations to obtain their passage free from Decatur to Danville, and thus defraud the company out of the sum required to pay their fare. In this there is a broad distinction from Muhling's Case, as in that case there was no pretense of fraud or wrong on his part. The court below should have given some one of the defendant's instructions which announced the view here expressed.

The evidence is not of the character to convince us that the judg-

ment should stand, notwithstanding the erroneous instructions given or the refusal to give proper instructions. We have no doubt that the erroneous instructions given misled the jury in finding their verdict.

For the errors indicated, the judgment of the court below must be reversed and the cause remanded.

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## CONDRAN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, 1895. 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749.)

Plaintiff brings error.

CALDWELL, C. J.[56] The case is stated by Judge Shiras, who tried it in the Circuit Court, in his charge to the jury, as follows:

"In the case now on trial before you it appears from the undisputed evidence in the case that on the evening of June 16, 1891, a passenger train on the defendant's line of railway was derailed at or near a bridge crossing the Coon river, not far from the town of Coon Rapids, in this state; that Henry Condran was on the train when it was derailed, and was instantly killed; that the plaintiff is the administratrix of his estate, and that she brings this suit to recover the damages caused to the estate of Henry Condran by his death, claiming that the said Henry Condran was a passenger on defendant's train, and that the derailment of the train, and consequent death of said Henry Condran, was caused by the negligence of the railway company. * * * If the deceased in fact had money with him, with which he could have paid his fare, but instead of paying the same, he intentionally misstated his situation to the conductor, and by false representation induced the latter to allow him to remain on the train, then it could not be said that he was rightfully upon the train, but he would be there in fraud of the rights of the company, and the legal relation of carrier and passenger would not in such case exist between him and the company. The company would then owe him no other duty than not to willfully or recklessly injure him, and, as there is no evidence in this case which would justify you in holding that the accident and consequent death of Henry Condran was due to recklessness or willfulness on part of the company, it follows that in case you find that said Condran fraudulently misstated the facts of his situation to the conductor, and as a consequence was allowed to remain on the train without paying his fare, then your verdict must be for the defendant. On the other hand, if the deceased had in fact paid his fare, or if, being without means, he fairly stated his condition and situation to the conductor, and the latter, in consideration of the statements made him, permitted Condran to remain on the train, then the relation ex-

[56] Parts of the statement of facts and opinion are omitted.

isting between Condran and the company would be that of passenger and carrier."

The only assignments of error which this court can notice are those which challenge the soundness of this charge. * * *

The rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him. Railway Co. v. Brooks, 81 Ill. 250; Railroad Co. v. Michie, 83 Ill. 431; Railway Co. v. Beggs, 85 Ill. 84, 28 Am. Rep. 613; Railroad Co. v. Mehlsack, 131 Ill. 64, 22 N. E. 812, 19 Am. St. Rep. 17; McVeety v. Railway Co., 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; Robertson v. Railway Co., 22 Barb. (N. Y.) 91; Railway Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; Prince v. Railroad Co., 64 Tex. 146; Railway Co. v. Campbell, 76 Tex. 175, 13 S. W. 19; Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; Id., 73 Iowa, 463, 35 N. W. 525.

The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its train under the conditions named the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without payment of the regular fare. But, if he had such authority, his assent obtained by the fraudulent means mentioned would confer no rights. One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured by an accident happening to the train, not due to recklessness or willfulness on the part of the company, he cannot recover. * * *

The judgment of the Circuit Court is affirmed.[57]

[57] In Austin v. Gt. Western Ry. Co., L. R. 2 Q. B. 442 (1867), the carrier charged half fare for children three years old. A passenger who did not know the rule took with her a child of three; the company let it ride free not knowing its age. The child recovered for negligent injury.

In Odell v. N. Y. C. R. Co., 18 App. Div. 12, 45 N. Y. Supp. 464 (1897), a carrier which issued a ticket good for visitors to the purchaser's family was

held to owe a duty of care to a person permitted to ride on the ticket, who presented it in good faith, though not a visitor within its meaning.

In Gary v. Gulf, etc., Ry. Co., 17 Tex. Civ. App. 129, 42 S. W. 576 (1897), a ticket holder who had taken a wrong train by mistake was held to be entitled to the care due a passenger while the train was stopped to put her off.

Where a railroad by its own mistake received and carried baggage checked to go by another route, it was held bound to the exercise of ordinary care, and therefore liable for negligent damage. Fairfax v. N. Y. C. R. Co., 73 N. Y. 167, 29 Am. Rep. 119 (1878). But where a traveler by steamboat, under a mistaken belief that he was entitled to do so, checked his trunk by a competing railroad, which took charge of it supposing it to belong to a railroad passenger, it was held that the railroad was not liable for damage by negligence, though gross, because under no duty to take care. Beers v. Boston, etc., Co., 67 Conn. 417, 34 Atl. 541, 32 L. R. A. 535, 52 Am. St. Rep. 293 (1896).

Where a man checked his trunk by a railroad over which he had no ticket and did not travel, it was held that the carrier, being a gratuitous bailee, was not liable for nonnegligent loss. Wood v. Me. Cent. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339 (1903). And a like decision was reached where, though he had a ticket and checked his trunk by means of it, he did not intend at any time to travel on the ticket. Marshall v. Pontiac, etc., Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650 (1901). But the carrier has been held liable where the owner had a ticket and intended to use it on a later day. McKibbin v. Wis. Cent. Ry., 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. Rep. 689 (1907). And where the carrier knew that the owner did not intend to use it at all. Adger v. Blue Ridge Ry. Co., 71 S. C. 213, 50 S. E. 783, 110 Am. St. Rep. 568 (1905).

## CHAPTER II

# EXCUSES FOR FAILURE TO TRANSPORT AND DELIVER

### HADLEY v. CLARKE.

(Court of King's Bench, Trinity Term, 1799. 8 Term R. 259.)

Assumpsit for breach of a contract of carriage. A verdict was found for the plaintiff, subject to the opinion of the court upon a case stated in which the following facts appeared:

In June, 1796, plaintiff shipped goods on board defendants' ship Pomona at Liverpool for a voyage to Leghorn. The ship sailed from Liverpool with goods of the plaintiff and of other shippers, and went to Falmouth to join convoy for the voyage to Leghorn. While she was at Falmouth, the British government, by an order in council of July, 1796, laid an embargo on vessels bound to Leghorn. By an order in council of August, 1796, such vessels were freed from the embargo so far as to permit them to return to their ports of loading and to discharge their cargoes. In June, 1798, defendants notified plaintiff that unless he chose to have his goods landed at Falmouth, they would be taken to Liverpool and discharged there. In August, 1798, the ship sailed without plaintiff's consent to Liverpool, where by agreement plaintiff received his goods without prejudice to his right of action. In October, 1798, the embargo was taken off.

LORD KENYON, C. J.[1] * * * It is admitted that an embargo, being imposed during the war, was a legal interruption of the voyage; but it would be attended with the most mischievous consequences if a temporary embargo were to put an end to such a contract as this, because, if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages. The difficulty in this case is to draw the line. The defendants contracted with the plaintiff to carry his goods to Leghorn; that contract was certainly obligatory at the time when it was made; and it must continue to be binding unless it has since been put an end to. Then, at what time was it put an end to? Was it put an end to during the ship's stay at Falmouth, or immediately after she sailed for Liverpool? It would afford an argument against the defendants in this particular case that they kept the goods on board during all this time, and thought they were bound by this contract. However I do not decide this case on that ground, but on the general ground that a tem-

[1] The statement of facts has been rewritten, and parts of Lord Kenyon's opinion have been omitted.

porary interruption of a voyage by an embargo, does not put an end to such a contract as this. If this contract were put an end to, it might equally be said that interruptions to a voyage from other causes would also have put an end to it; e. g., a ship being driven out of her course. And yet that was never pretended. Instances of such interruptions frequently occur in voyages from the northwest parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark, where they have been obliged to winter. * * *

GROSE, J. This seems to be a case of peculiar hardship either on the one side or the other, and therefore we must determine it according to the strict rules of law. This contract was certainly binding on these parties at the time; and I agree with the defendants' counsel that the true meaning of it was, that the defendants were bound to convey the plaintiff's goods within a reasonable time. After the contract was made, an embargo was imposed, which was only a temporary restraint, and prevented the ship's performing her voyage at that time; but still the defendants were bound to comply with the terms of the contract as soon as they reasonably could. Even if we consider the embargo to have the same effect as an act of Parliament, still it would only create a temporary restraint, until such time as the King in Council should take off the embargo. Such an act of Parliament would not dissolve, it would only suspend the execution of, the contract; and the embargo cannot have a greater effect. If the embargo dissolved the contract, when did the dissolution take place? The mere stating of the question puts an end to all further inquiry. The defendant's counsel could not show at what precise time the contract was dissolved; and if this contract were dissolved by the embargo, it would be followed by the very alarming consequence stated at the bar, that all the contracts between the owner and the mariners would also be put an end to. Here, neither of the parties being in fault, the strict law must take place. The defendants have not done that which, by their contract, they were bound to perform; and, therefore, the plaintiff is entitled to recover the damages which he has sustained by reason of their nonperformance of the contract.

LAWRENCE, J. This is certainly a case of hardship on the defendants; but I do not see any legal grounds on which they can be excused paying the damages which the plaintiff has suffered in consequence of their not having performed their engagement. The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains. They contended that the defendants were only bound to fulfill their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from their engagement altogether; but it was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would en-

gage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms; and absolutely engaged to carry the goods, "the dangers of the seas only excepted." That therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract.

In All. 27, this distinction is taken: "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." So, in this case, there was one accident against which the defendants provided by their contract: They might also have provided against an embargo; but we cannot vary the terms of this contract, and the defendants must be bound by the terms of the contract that they have made.

Postea to the plaintiff.[2]

[2] See, also, cases cited, ante, p. 58, note.

In Jackson v. Union Marine Ins. Co., L. R. 10 C. P. 125 (1874), a chartered vessel on her way to the port of loading was so damaged by perils of the sea that, as the jury found, "the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers." The charterers refused to load. It was held that the shipowner was entitled to recover from his underwriter for a loss of freight by peril of the sea, since the disaster resulted in putting an end to the charterers' obligation. Bramwell, B., said: "I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage. * * * Thus A. enters the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement. A short illness would not suffice, if consistent with the object they had in view. * * * There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. * * * It remains to examine the authorities. The first in date relied on by the defendants is Hadley v. Clarke. Now, it may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed; the ship had loaded and sailed in due time. * * * Further, in that case there was no finding, nor anything equivalent to a finding, that the objects of the parties were frustrated. This case is therefore in every way distinguishable." See, also, Stanton v. Richardson, L. R. 7 C. P. 421, 432, 433 (1872).

In The Savona, [1900] P. 252, the carrier had undertaken to transport a cargo of coal "perils of the sea excepted." By perils of the sea the coal be-

## ESPOSITO v. BOWDEN.

(Court of Queen's Bench, Trinity Term, 1857. 7 El. & Bl. 763.)

WILLES, J.[a] The principal question in the case is as to the validity of the plea. It is, in effect, whether a charter party, made before the late Russian war between an English merchant and a neutral shipowner, whereby it was agreed that the neutral vessel should proceed to Odessa, a port of Russia, and there load from the freighter's factors a complete cargo of wheat, seed or other grain, and proceed therewith to Falmouth, with usual provisions as to laying days and demurrage, was dissolved by the war between England and Russia, alleged by the charterer in his plea, which is to be taken as true for the purpose of the present discussion, to have broken out before the vessel arrived at Odessa, and to have continued up to and during the

came wet and was discharged at a port of refuge. Because of the danger of spontaneous combustion from wet coal on a tropical voyage it could not safely be reshipped without drying it or screening out the small pieces. With the facilities available it was reasonably supposed that the delay and expense of either course would be out of proportion to the value of the coal. The shipowner was held to have been justified in abandoning the voyage though it shortly afterward proved practicable to send the coal forward.

In Nobel's Explosives Co. v. Jenkins, [1896] 2 Q. B. 326, a steamer carrying goods of different shippers took as part of her cargo explosives shipped under a bill of lading by whose terms they were to be delivered at Yokohama, restraint of princes excepted, and subject to the master's right to land them at the nearest safe port if by reason of war Yokohama should be unsafe. During the voyage, war began between China and Japan. When the steamer reached Hong Kong, she was obliged to fly a red flag, which denoted the presence of explosives. Chinese men of war were near, and, the explosives being subject to seizure as contraband of war, it was likely that if the steamer proceeded she would be stopped and searched. Her master landed the explosives at Hong Kong against the protest of their owner, continued his voyage without interruption, and safely delivered the rest of the cargo at Yokohama. In an action for not delivering the explosives, Mathew, J., after expressing an opinion that the clauses of the bill of lading furnished a defense, said: "But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiff confiscated. In the words of Willes, J., in Notara v. Henderson [ante, p. 73]: 'A fair allowance ought to be made for the difficulties in which the master may be involved. * * * The place, the season, * * * the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril—in short, all circumstances affecting risk, trouble, delay, and inconvenience—must be taken into account.' I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But, even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

Acc. The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027 (1902).

[a] The statement of facts and parts of the opinion have been omitted.

time when the loading was to have taken place; it being further alleged in the plea that, from the time war was declared, it became and was impossible for the charterer to perform his agreement without dealing and trading with the Queen's enemies.

It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal. * * *

As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it. Such was the opinion of Lord Ellenborough, at a time when the question must recently have often occurred and been well considered and understood, in Barker v. Hodgson (1814) 3 M. & S. 267, 270, where it was held that the prevalence of an infectious disorder at the port of loading, and consequent prohibition of intercourse by the law of the port, were not sufficient to excuse the charterer from loading; and Lord Ellenborough, in delivering judgment, said: "The question here is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." [4] A similar opinion was expressed by the same eminent judge in Atkinson v. Ritchie (1809) 10 East, 530.

Lord Tenterden, also, in his work on Shipping, states the law thus:

[4] Acc. Blight v. Page, 3 B. & P. 295, note (1801), shipment prevented by embargo; Sjoerds v. Luscome, 16 East, 201 (1812), shipment prevented by embargo; Kirk v. Gibbs, 26 L. J. Ex. 209 (1857), permit to ship refused; Jacobs v. Credit Lyonnaise, 12 Q. B. D. 589 (1884), performance of contract of sale prevented by prohibition of export; Benson v. Atwood, 13 Md. 20, 71 Am. Dec. 611 (1859), shipment illegal; Holyoke v. Depew, 2 Ben. 334, Fed. Cas. No. 6,652 (1868), carrier forbidden to load; Tweedie Trading Co. v. Jas. P. McDonald Co. (D. C.) 114 Fed. 985 (1902), charterer prevented from furnishing vessel with passengers as agreed, because deportation of laborers was forbidden. In the latter case, Adams, J., said: "The question really is, do the legal acts of the agents of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties? Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse, when the act which was contemplated

"Another general rule of law furnishes a dissolution of these contracts" (i. e., for the carriage of goods in merchant ships) "by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the French ordinance." It may be added that the cases above put by Lord Tenterden cannot be treated as isolated propositions, but as instances of the general principle of law with which they are prefaced. * * *

It is clear that the charterer could maintain no action against the shipowner for refusing to take on board a cargo which the charterer could load only by dealing and trading with the enemy: and, on the other hand, neither ought the shipowner to maintain an action against the charterer for not doing so.

This is not an unequal law, because if war had broken out between the Czar and the King of the Two Sicilies, instead of Her Majesty, the vessel would, according to the principles stated above, have been absolved from going to Odessa, and might forthwith have proceeded upon another voyage.[5] Even the common principle of reciprocity, therefore, points out that a similar indulgence ought to be allowed to the merchant, when, in consequence of war declared by his sovereign, he is involved in like difficulties. Under such circumstances, in all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other op-

by the contract was valid in view of the law of the place where it was made, and a fortiori when it was also then valid at the place of performance.

See, also, Gosling v. Higgins, 1 Camp. 451 (1808), unlawful seizure by revenue officers; Evans v. Hutton, 5 Scott's N. R. 670, 12 L. J. C. P. 17 (1842); Spence v. Chodwick, 10 A. & E. 517 (1847), lawful seizure of cargo at port of call; Finlay v. Liverpool, etc., Co., 23 L. T. 251 (1870), delivery in pursuance of decree of foreign port of departure. But see So. Ry. Co. v. Heymann, 118 Ga. 616, 45 S. E. 491 (1903), goods confiscated at destination in another state; The Asiatic Prince, 108 Fed. 287, 47 C. C. A. 325 (1901), delivery at foreign port of destination to customs officers according to local law; Pingree v. Detroit, etc., R. Co., post, p. 124, and cases in note.

[5] See The Teutonia, cited ante, p. 46, note.

portunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence, and in times when to permit trading with the enemy even through neutrals was the exception, not the rule. These considerations may explain the origin of the rule authoritatively laid down in the books as to war at once working an absolute dissolution. * * *

We therefore reverse the judgment of the court below, and give judgment for the defendant. Judgment reversed.[6]

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## THE IDAHO.

**(Supreme Court of the United States, 1876. 93 U. S. 575, 23 L. Ed. 978.)**

Appeal from the Circuit Court of the United States for the Eastern District of New York.

The libelants claim damages against the Idaho for the nondelivery of 165 bales of cotton, part of a shipment of 200 bales for Liverpool, made by Thomas W. Mann, and consigned to the order of James Finlay & Co. After the shipment, the libelants purchased the cotton from Mann, who indorsed to them the ship's bill of lading therefor. On the arrival of the vessel at Liverpool, 35 bales were delivered to Finlay & Co., but the remaining 165 were delivered to Baring Bros. & Co., in pursuance of an order from William J. Porter & Co. of New York. Such a delivery was not in accordance with the stipulations of the bill of lading; but it is attempted to be justified by the alleged fact that Porter & Co. were the true owners of the cotton, and as such had a right, superior to that of the shippers, to control its delivery. * * *

STRONG, J.[7] In determining the merits of the defense set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for nondelivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law, and some contrariety of decision:

In Rolle's Abr. 606, tit. "Detinue," it is said: "If the bailee of goods deliver them to him who has the right to them, he is, notwithstanding, chargeable to the bailor, who, in truth, has no right." And for this 9 Henry VI, 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner. Id. 607, for which 7 Henry VI, 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when

[6] Acc. Brown v. Delano, 12 Mass. 370 (1815). See Bailey v. De Crespigny, L. R. 4 Q. B. 180 (1869); The Cargo ex Galam, 33 L. J. Ad. 97, 2 Moo. P. C. (N. S.) 216 (1863).

[7] Parts of the statement of facts and of the opinion are omitted.

they were announced, can hardly command assent now. It is now everywhere held that, when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for nondelivery, according to the directions of the bailor. Bliven v. Hudson River Railroad Co., 36 N. Y. 403. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Bates v. Stanton, 1 Duer (N. Y.) 79; Hardman v. Wilcock, 9 Bing. 382; Biddle v. Bond, 6 Best & S. 225.

If it be said that, by accepting the bailment, the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed—to restore it, or to account for it. Cheeseman v. Exall, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. Biddle v. Bond, supra.

Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that, in some of the cases, fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the jus tertii. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practiced upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and if he cannot withhold the possession from the true owner, one claiming under him cannot.

The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of Biddle v. Bond, supra, decided in 1865, it was so decided; and Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstance that there was no evidence to show the plaintiff, though a wrongdoer, did not honestly

believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them.

In Western Transportation Company v. Barber, 56 N. Y. 544, the Court of Appeals of New York unanimously asserted the same doctrine, saying, "The best-decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defense to an action brought by a bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud; and we think no such distinction can be made.

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees. * * *

It follows from all we have said that the delivery by the Idaho of the 165 bales, to the order of Porter & Co., was justifiable, and that the libelants have sustained no legal injury. Decree affirmed.[3]

[3] See Biddle v. Bond, 6 B. & S. 225 (1865), bailee permitted to set up title of third person at whose request he retained the goods without delivery; Valentine v. Long Island R. Co., 187 N. Y. 121, 79 N. E. 849 (1907), carrier permitted to set up its own title; Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154 (1897); Merchants' Nat. Bk. v. Bales, 148 Ala. 279, 41 South. 516 (1906); Hutchinson on Carriers (3d Ed.) § 751. A common carrier who, after demand by an owner entitled to possession, delivers instead to the consignee, is guilty of conversion. Wells v. Am. Ex. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (1882); Lester v. Del., L. & W. R. Co., 92 Hun, 342, 36 N. Y. Supp. 907 (1895). It has been so held even where the owner was a stranger to the contract of carriage and had failed to avail himself of an opportunity to replevy the goods. Shellenberg v. Fremont, etc., Ry. Co., 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561 (1895); Georgia, etc., Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327 (1906). And see Wilson v. Anderton, 1 B. & Ad. 450 (1830). Contra: Kohn v. Richmond Co., 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726 (1892); Switzler v. No. Pac. Ry. Co., 45 Wash. 221, 88 Pac. 137, 12 L. R. A. (N. S.) 254, 122 Am. St. Rep. 892 (1907). But a carrier is not liable if without notice of claim by a third person he has delivered to the consignee. Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531 (1887). Or has settled with the consignee for goods destroyed. Dyer v. Gt. No. Ry. Co., 51 Minn. 345, 53 N. W. 714, 38

## BURGHALL v. HOWARD.

(In Guildhall, 1759. 1 H. Bl. 366, note.)

One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard the defendant was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered on behalf of Bromley not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the defendant's witnesses that no particular ship was mentioned, whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as a carrier.

LORD MANSFIELD was of opinion that the plaintiffs had no foundation to recover, and said he had known it several times ruled in chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property.

The plaintiffs were nonsuited.[8]

Am. St. Rep. 506 (1892). Nor though he has notice is he guilty of conversion by reasonably detaining the goods for inquiry. Merz v. Chicago & N. W. Ry. Co., 86 Minn. 33, 90 N. W. 7 (1902).

[8] "The right of stoppage in transitu is nothing more than an extension of the right of lien, which by the common law the vendor has, upon the goods, for the price, originally allowed in equity and subsequently adopted as a rule of law. By a bargain and sale without delivery the property vests in the vendee; but where, by the terms of sale, the price is to be paid on delivery, the vendor has a right to retain the goods till payment is made, and this right is strictly a lien, a right to detain and hold the goods of another as security for the payment of some debt or performance of some duty. But when the vendor and vendee are at some distance from each other, and the goods are on their way from the vendor to the vendee, or to the place by him appointed for their delivery, if the vendee become insolvent and the vendor can repossess himself of the goods, before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This, however, does not rescind the contract, but only restores the vendor's lien, and it can only take place when the property has vested in the vendee." Shaw, C. J., in Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607 (1832).

"When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power, the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods in transitu, or retains them before transitus has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title. His right is very nearly that of a pledgee, with power to sell at pri-

## ALLEN v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, 1887. 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.)

On report, upon agreed statement of facts, from the superior court.

Case for the value of four bales of woolen rags, of the value of $176.41, shipped by William F. Allen & Co., of Philadelphia, to William Beatty, of Gray, Maine.[10] * * *

EMERY, J. The only mooted question in this case is, whether the plaintiffs effectually exercised against the carrier their clear right of stopping the goods in transitu.

The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company (the carrier) to stop and return the goods. The defendant company contend the notice was insufficient, because there was no statement of the nature or basis of the claim to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and by such a notice as was given here is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In Benjamin on Sales, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, etc., it is also stated that "all that is required is some act or declaration of the vendor countermanding the delivery." Brewer, J., in Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84, said: "A notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In Cleminston v. Grand Trunk Ry. Co., 42 U. C. Q. B. 263, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

The defendant further contends that the plaintiff's omission to

vate sale in case of default." Follett, C. J., in Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348 (1891).

"But, further, as to the right of seizing or stopping the goods in transitu, I hold that no man who has not equity on his side can have that right. I will say with confidence that no case or authority, till the present judgment, can be produced to show that he has. But, on the other hand, in a very able judgment delivered by my Brother Ashhurst in the case of Lempriere v. Pasley, in 1788, 2 Term Rep. 485, he laid it down as a clear principle that, as between a person who has an equitable lien and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason; for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him, has equity in his favor; and if he have law and equity both with him, he cannot be beat by a man who has equal equity only." Buller, C. J., in Lickbarrow v. Mason, 6 East, 20, note (House of Lords, 1793).

The right to stop in transitu exists, though the goods are sent from seller to buyer otherwise than by a carrier. Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50 (1899), logs in possession of log-driving company.

[10] Part of the statement of facts is omitted.

afterward prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man, against whom conflicting claims are made. If, as is alleged here, the circumstances are such that he cannot compel them to interplead, he must inquire for himself, and resist or yield at his peril.[11]

It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith toward the carrier. He should, if requested, furnish him in due time with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company, having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for $176.41, with interest from the date of the writ.

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## PINGREE v. DETROIT, L. & N. R. CO.

**(Supreme Court of Michigan, 1887. 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479.)**

CAMPBELL, C. J.[12] This case presents a single question on facts found.

Plaintiffs had a chattel mortgage against Francis M. and Myron C. Butts, which was made on August 4, 1886. The next day the two Butts made a transfer of the property to one Steere. Plaintiffs replevied from Steere, and on August 12 shipped the goods by defendant's railroad from Edmore, directed to Detroit, taking the usual bill of lading. On the same day, the goods were taken by the sheriff at Stanton, on an attachment against said F. M. and M. C. Butts, in favor of John W. Fuller and others. Defendant notified plaintiffs of this seizure. Plaintiffs now sue defendant for not delivering the

[11] But see Pool v. Columbia, etc., R. Co., 23 S. C. 286 (1885); The E. H. Pray, 27 Fed. 474 (1886); The Vidette, 34 Fed. 396 (1888).

[12] Parts of the dissenting opinion are omitted.

goods at Detroit. The question is, whether the seizure by the sheriff exonerated defendant from such delivery. The court below held that it did.

There seems to be a little apparent conflict between the cases on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property from a person not authorized to direct its shipment, he has been declared by the supreme court of this state to have no lien for his services, and no right to retain the property. Fitch v. Newberry, 1 Doug. 1, 40 Am. Dec. 33. There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending, unless the consignor gives it to him. In the present case, the attachment was against plaintiffs' mortgagors, and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure without incurring the risk of serious civil, and perhaps criminal, liability; and if plaintiffs' claim is correct, this must have been done at defendant's own risk and expense.

This precise question was decided in favor of the carrier in Stiles v. Davis, 1 Black, 101, 17 L. Ed. 33, upon the ground that defendant was not required to resist the sheriff, and could not properly do so. This rule has been adhered to by the United States supreme court, and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of goods, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper.

Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority.

I think the judgment should be affirmed.[18]

[18] Acc. Bliven v. Hudson River R. Co., 36 N. Y. 403 (1867); Indiana, etc., Ry. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264

CHAMPLIN and MORSE, JJ., concurred.

SHERWOOD, J. (dissenting). This is an action against the defendant, as common carrier, to recover damages for its failure to carry safely, and deliver in Detroit, a quantity of boots and shoes. * * *

While the carrier is in possession of the consignor's goods he is clothed with all the power and authority to protect and preserve them that the owner himself would have, and, while the goods are in transit, it is his duty to use all the means that human agency can command to give such protection; and it is only after such means are exhausted, can he be heard in his defense against the liability the common law casts upon him if injury or damage ensue.

In this case the court finds that the goods in question were taken by the sheriff of Montcalm county without the consent, connivance, privity, or procurement of the defendant, and that it immediately

(1898); Merz v. Chicago, etc., Ry. Co., 86 Minn. 33, 90 N. W. 7 (1902). Contra: Edwards v. White Line Tr. Co., 104 Mass. 159, 6 Am. Rep. 213 (1870). And see Gosling v. Higgins, 1 Camp. 451 (1808); Am. Ex. Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525 (1909). Compare the following cases in which the carrier was held liable: Merz v. Chicago & N. W. Ry. Co., 86 Minn. 33, 90 N. W. 7 (1902), no proof that writ was valid on face or that court had jurisdiction; Merriman v. Ex. Co., 63 Minn. 543, 65 N. W. 1080 (1896), seizure by game warden without warrant and under repealed law; Bennett v. Express Co., 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774 (1891), deer wrongfully seized by game warden; Nickey v. St. Louis, etc., Ry. Co., 35 Mo. App. 79 (1889), goods surrendered on telegram from sheriff, before service of warrant; Kiff v. Old Col. R. Co., 117 Mass. 591, 19 Am. Rep. 429 (1875), attachment of cases which without carrier's knowledge contained liquors, exempt under prohibitory law from attachment or sale.

Where goods are taken from the carrier by legal process, the carrier should notify the owner, that he may protect his interest, and for a failure to give notice may be liable. Ohio, etc., Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727 (1875). At least unless he proves that no harm resulted. Robinson v. Memphis, etc., R. Co. (C. C.) 16 Fed. 57 (1883).

"But upon the well-settled rules of the maritime law it is the undoubted duty of the master, upon any interference with his possession, whether by legal proceedings or otherwise, to interpose for the owner's protection, and to make immediate assertion of his rights and interests, by whatsoever measures are appropriate at the time and place. To that extent the master is bound to take part in legal proceedings, and to continue them until, after informing his absent consignee both of the facts and of the local law so far as need be, the owner has a reasonable opportunity to take upon himself the burden of the litigation." Brown, J., in The M. M. Chase (D. C.) 37 Fed. 708 (1889).

Garnishment statutes are usually, but not always, regarded as not applying to goods in the hands of common carriers, which have not reached their destination. The carrier's duty as to such goods is more than simply to make delivery. Stevenot v. Eastern Ry. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600 (1895); Bates v. Railway Co., 60 Wis. 296, 305, 19 N. W. 72, 50 Am. Rep. 369 (1884); Adams v. Scott, 104 Mass. 164 (1870); Hutch. on Carriers (3d Ed.) §§ 746–748; 28 L. R. A. 600 note; 14 Harvard Law Rev. 384.

As to a carrier's liability for goods confiscated by government, see Nashville, etc., R. Co. v. Estis, 7 Heisk. (Tenn.) 622, 24 Am. Rep. 289 (1872); Railroad Co. v. Hurst, 11 Heisk. (Tenn.) 625 (1872); Wells v. Steamship Co., 4 Cliff. 228, Fed. Cas. No. 17,401 (1874); Nashville, etc., R. Co. v. Estes, 10 Lea (Tenn.) 749 (1882); So. Ry. Co. v. Heymann, 118 Ga. 616, 45 S. E. 491 (1903).

It is no excuse for a carrier's failure to deliver that he reasonably believed the consignee would use the goods to commit a crime. Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476 (1892).

notified the plaintiffs of the seizure; but this is not enough to exculpate the defendant from liability, under the facts found. There is no pretense that the writ under which the sheriff acted ran against the defendant, the consignors, or this property, nor yet against the latter's vendor of the goods. It does not appear that he was directed by the writ to levy it upon any specific property in the custody of defendant or of the consignors. * * *

The sheriff who took this property from the defendant had no more right, so far as this record shows, to take the same, than any other citizen of Montcalm county. The defendants suffered the property to be taken from the carrier by a trespasser, and this brings the case clearly within the liability of the undertaking, and entitles the plaintiffs to a recovery. * * *

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## ASSICURAZIONI GENERALI v. STEAMSHIP BESSIE MORRIS CO.

(Court of Appeal, [1892] 2 Q. B. 652.)

LORD ESHER, M. R.[14] One of the questions which have been discussed is the construction of the charter party. The charter party is a contract between the shipowner and the charterer that the former will take the cargo offered by the latter, and will carry it as directed by the charterer to a safe port in the United Kingdom, unless prevented by the perils of the sea, which are excepted in the charter party. It is an absolute contract by the shipowner to carry the goods to the port named by the charterer, which in this case was London, unless prevented by the excepted perils of the sea. It became an absolute contract on the part of the shipowner to convey the goods to London, and the only thing which could excuse him from doing so was that he had been prevented by the perils of the sea.

In applying this to the facts of the case, we have to see whether the shipowner, who never brought the ship to London, was prevented from so doing by the perils of the sea. The ship was stranded near Gibraltar. If she could not have been got off it is obvious that she would have been prevented from fulfilling the voyage by the perils of the sea. But she was got off. If she had been got off as a mere wreck, as explained by Maule, J., in Moss v. Smith, 9 C. B., at pages 102, 103, and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfillment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other

[14] The statement of facts, parts of the opinions, and a concurring opinion by Kay, L. J., have been omitted.

voyage.[15] But, in fact, the ship was got off, and she was taken to Gibraltar, where she could be repaired.

What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But, as Maule, J., said, in the case to which I have referred, the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. * * * The repairs were executed at a cost very far less than the value of the ship, and, that being so, no reasonable shipowner having regard to his own interests would have failed to do the repairs.

The shipowners were prevented from performing the voyage, not by the perils of the sea, but their own willful disregard of their contract, or, at any rate, by their misreading of it. * * * But before starting upon the voyage they borrowed some money of the charterers. * * * The shipowners have had the benefit of every shilling of the disbursements, and they are bound to repay to the plaintiffs the sum which they advanced. Beyond that the plaintiffs are entitled

[15] "It is suggested that here the contract was for the carriage of the goods in the ship North America, and not in any other ship, and that when she was lost the duties of carrier were ended, and the contract prevented from being performed, by the perils of the seas. But this is not a true view of the law upon this subject. The gold coin was to be transported in that ship, if she was in a condition to carry it. But when she became disabled, it was the duty of the carrier master to carry it on or send it in another ship, if practicable." Story, J., in King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804 (1844).

By the maritime law "as understood in England, the master, from the necessity of the case, had the right, and by our law the duty, in case of disaster to his ship, to tranship the goods and send them on by another vessel, if one could be had. The Maggie Hammond, 9 Wall. 435, 458 [19 L. Ed. 772]; 3 Kent, Com. 212." Gray, J., in Harrison v. Fortlage, 161 U. S. 57, 65, 16 Sup. Ct. 488, 490, 40 L. Ed. 616 (1896).

A carrier who justifiably tranships in order to fulfill his contract of carriage is entitled on delivery at destination to full freight, though he has shipped by another carrier and at a lower rate. Shipton v. Thornton, 9 A. & E. 314 (1838). And is liable for loss, The Bernina, L. R. 12 P. D. 36 (1886). In Shipton v. Thornton, Lord Denman, C. J., said: "It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no farther charge to the freighter, and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. * * * The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owner's right to tranship will be at end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight, and, if so, it will be the duty of the master as his agent to do so. In such a case, the freighter will be bound by the act of his agent, and, of course, be liable for the increased freight." See ante, p. 58, note.

to any damages which they have suffered and which are the natural result of the shipowners' default. * * *

BOWEN, L. J. I am of the same opinion. * * * In the present case, so far from the ship being unnavigable, or having been treated as such, she was repaired, and was put into a condition fit for the performance of her voyage. The test, what is the state of circumstances which entitles the shipowner to abandon the voyage? is obviously applicable only when he acts upon it; and if, whatever the expense of repairing the ship may be, he submits to incur it, it would be absurd to discuss the question of constructive loss. * * *

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LAWS OF OLERON, art. XXIII: "A merchant freights a ship and loads her, and sets her on her way, and the ship enters a port, and remains there so long that money fails them; the master keeps well, and he may send to his own country to seek for money; but he ought not to lose time, for if he does so, he is bound to indemnify the merchants for all the damage which they shall incur. But the master may well take of the wines of the merchants and sell them to obtain provisions. And when the ship shall have arrived at her right discharge, the wines which the master shall have taken ought to be valued at the same market price at which the others shall be sold, neither at a higher nor at a lower price. And the master ought to have his freight of those wines, as he shall have of the others. And this is the judgment in this case." [16]

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## BUTLER v. MURRAY.

**(Court of Appeals of New York, 1864. 30 N. Y. 88, 86 Am. Dec. 355.)**

This was an action by N. Rogers & Co., of which firm Charles Butler was the surviving partner, against D. Colder Murray and others, owners of the schooner Pedee, to recover the value of a quantity of hides shipped on board that vessel at Aspinwall, consigned to the plaintiffs at New York, and which were never delivered to them.

The defense was that, the vessel having put into the port of Carthagena in distress, the hides were found to be in a perishing condition, and that the master, acting in good faith and in the exercise of a sound discretion, to prevent further loss, had caused them to be

[16] "If the goods fetch more at the intermediate port, the owner of the cargo would naturally elect to treat the matter as a loan; but when he thinks it for his interest to insist, and does insist, on an indemnity on the footing that the value of the goods must be treated as if they were carried to their destination, then he must allow for the freight that would have been earned by carrying them there." Brett, J., in Hopper v. Burness, 1 C. P. D. 137, 141 (1876).

sold at auction, and that the defendants, after deducting the amount due for general average and expenses, had tendered the proceeds to the plaintiffs. * * * The learned judge, at the conclusion of the testimony, * * * instructed the jury that the plaintiffs were entitled to recover, and that the only question for them to decide, was the amount of damages. To which the defendant's counsel excepted. The jury found a verdict in favor of the plaintiffs for $881.38; and, the judgment entered thereon having been affirmed at General Term, the defendants took this appeal.

MULLIN, J.[17] The master of a vessel is, for most purposes, the agent of the owners of the ship and cargo; but that agency does not extend to a sale of either, unless there is a necessity, at the time, for so doing. Abbott on Shipping, 365 et seq. in notes.

The degree of the necessity which must be shown to have existed, in order to justify a sale of ship or cargo, has been differently stated by different judges and writers on maritime law. * * *

The difficulty lies, not so much in finding the rule, as in applying it in a given case. There is no doubt but that, in order to justify the sale of a cargo at an intermediate port, several things must concur: (1) There must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship or to procure another. (2) The master must have acted in good faith. (3) He must, if practicable, consult with the owner before selling. Abbott on Shipping 447, and notes; New England Insurance Co. v. Brig Sarah Ann, 13 Pet. 387, 10 L. Ed. 213; Bryant v. Commonwealth Insurance Co., 13 Pick. (Mass.) 543.

No question as to the good faith of the master, or of his inability under the circumstances to consult with the owners, is raised. But it is insisted that a necessity for the sale is not proved, for two reasons: (1) Because the property, although injured, could, by a moderate outlay, have been put in order, so as to be carried to New York, without further material injury; and (2) the master should have sent forward the property by another vessel.

Neither the master nor owners were answerable for the delay which had occurred after leaving Aspinwall. It was caused by a visitation of Providence, against which human foresight could not guard. The damage to the hides arose from their own inherent properties, and the heat of the climate in which the voyage was made. Before unloading the hides at Carthagena, the worms that caused the damage were discovered on the deck of the vessel. When the hides were taken from the hold and put on the deck, the hair was found eaten off, and holes eaten in them; and, if permitted to remain in the vessel, it is not denied but that they would have been utterly ruined. The master caused them to be beaten while on the deck, which it is shown is one

[17] Parts of the statement of facts and of the opinion are omitted.

means of removing, in whole or in part, the vermin that were causing the injury. The vessel was found not to be in a condition to continue the voyage, and another ship might have been procured to carry the hides to New York, as the purchasers of them at the master's sale chartered a vessel which brought them to New York. * * * There is no evidence that the master knew that washing in sea water would be any greater protection than the means he had already employed. Under these circumstances, he summoned three respectable men, dealers in hides and the shipment thereof from Aspinwall to Carthagena, and from the latter place to New York, to examine the hides and declare what it was proper for him to do under the circumstances. They advised a sale, and the hides were sold, and, as witnesses, they swear that the advice was given in good faith. This advice was not conclusive; but the question is whether, on view of the facts then known to the parties, it was apparently necessary to sell the hides.[18] * * * If the jury should believe, from the evidence of the witnesses, that, judging from the condition of the hides, as they were when found on the wharf at Carthagena, that if reshipped by any vessel, and sent to New York within a reasonable time, they would be so damaged as to be practically valueless as hides, the defendants would be entitled to a verdict.

Although it has happened that the hides did arrive in New York, and were sold for a much larger price than that received in Carthagena, and although it is competent to prove those facts, and for the jury to consider them, in determining the question of necessity, yet the question, after all, must be determined upon the facts existing at the time when the sale was made. In every aspect in which I have examined the case, a case is presented which made it necessary to submit it to the jury; and because it was not done, the judgment of the Supreme Court must be reversed, and a new trial ordered, costs to abide event.

Judgment reversed, and new trial awarded.[19]

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LAWS OF OLERON, art. VIII: "If a vessel be laden to sail from Bordeaux to Caen, or any other place, and it happens that a storm overtakes her at sea, so violent that she cannot escape without casting some of the cargo overboard for lightening the vessel, and preserving the rest of the lading, as well as the vessel itself, then the master ought to say, 'Gentlemen, we must throw part of the goods over-

[18] Acc. The Amelie, 6 Wall. 18, 29, 18 L. Ed. 806 (1867). Compare Myers v. Baymore, 10 Pa. 114, 49 Am. Dec. 586 (1848).

[19] See, also, Am. Ex. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561 (1878), perishable goods sold in transit; Hull v. Mo. Pac. Ry. Co., 60 Mo. App. 593 (1895); Dudley v. Chic., M. & St. P. Ry. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027 (1906), goods sold at destination on consignee's refusal to receive; Briggs v. Boston, etc., Co., post, p. 295.

board;' and if there are no merchants to answer him, or if those that are there approve of what he says by their silence, then the master may do as he thinks fit; and if the merchants are not pleased with his throwing over any part of the merchandise, and forbid him, yet the master ought not to forbear casting out so many of the goods as he shall see to be for the common good and safety; he and the third part of his mariners making oath on the Holy Evangelists, when they arrive at their port of discharge, that he did it only for the preservation of the vessel, and the rest of the lading that remains yet in her. And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the just value of the other goods that arrive in safety. And when these shall be sold, the price or value thereof ought to be divided livre a livre among the merchants. The master may compute the damage his vessel has sustained, or reckon the freight of the goods thrown overboard at his own choice. If the master does not make it appear that he and his men did the part of able seamen, then neither he nor they shall have anything. The mariners also ought to have one tun free, and another divided by cast of the dice, according as it shall happen, and the merchants in this case may lawfully put the master to his oath."

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SIR WILLIAM SCOTT in THE GRATITUDINE, 3 C. Rob. 240 (1801): "It must unavoidably be admitted that in some cases he (the master of a ship) must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, which he may be compelled to enter. The case of throwing overboard parts of the cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power, in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it can never be maintained that he might not, because it can never be for the benefit of the cargo, throw the whole cargo overboard. The only obligation will be that the ship should contribute its average proportion." [20]

[20] "One other exception seems to be made by the common law, which has not so far been noticed, viz., that where goods have been intentionally and properly destroyed or damaged during the course of a voyage, in order to save the ship and the remainder of the cargo from a danger which was common to the whole, the shipowner is not answerable. Where goods have been thus sacrificed, the law, except in certain cases, e. g., deck cargo, gives the owner a right to contributions towards his loss from those whose property is saved. But otherwise no claim for the goods or their value can be made against the shipowner. An illustration of this principle is, where water has been poured into the hold of a ship in order to extinguish a fire." Carver, Carriage by Sea, § 15.

GRAY, J., in RALLI v. TROOP, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742 (1895): The law of general average, coming down to us from remote antiquity, is derived from the law of Rhodes, through the law of Rome, and is part of the maritime law, or law of the sea, as distinguished from the municipal law, or law of the land.

The typical case is that mentioned in the Rhodian law preserved in the Pandects of Justinian, by which, if a jettison of goods is made in order to lighten a ship, what is given for the benefit of all is to be made good by the contribution of all. "Cavetur ut, si levandae navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est." Dig. 14, 2, 1, 1.

Another case of general average, put in the Pandects, and the only one, beside jettison, mentioned in the Judgments of Oleron, or in the Laws of Wisby, is the cutting away of a mast to save ship and cargo. Dig. 14, 2, 1, 4; Oleron, arts. 8, 9; Wisby, arts. 7, 11, 14.

The distinction between voluntary and compulsory sacrifice is well illustrated by another case stated in the Pandects, recognized in the earliest English case on general average, and approved in all the books, in which money voluntarily paid by the master to ransom the ship and cargo from pirates is to be contributed for; but not so as to goods or money forcibly taken by pirates. Dig. 14, 2, 1, 5; Hicks v. Palington (32 Eliz.) Moore, 297.

In the courts of England and America general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; but it has never been extended beyond the spirit and principle of those laws. * * *

There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice, or upon an implied contract, or upon a rule of the maritime law known to and binding upon all owners of ships and cargoes. But the difference has been rather as to forms of expression than as to substantial principles or legal results. * * *

The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.

To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime adventure, for the purpose and with the effect of saving the other parts of the adventure from an imminent peril impending over the whole.

The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The

safety of property not included in the common adventure can neither be an object of the sacrifice nor a ground of contribution.

As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and the safety of that adventure, and not be caused by the compulsory act of others, whether private persons or public authorities. * * *

# CHAPTER III

# THE COMPLETION OF THE CARRIER'S UNDERTAKING

## SECTION 1.—PLACE AND MANNER OF TENDER TO CONSIGNEE

### GIBSON v. CULVER.

(Supreme Court of New York, 1837. 17 Wend. 305, 31 Am. Dec. 297.)

This was an action on the case against the defendants as common carriers, tried in the Rensselaer circuit in March, 1835. They were the owners of a stage, in which they carried the mail, and also passengers and goods, from Sandlake, in Rensselaer county, to Albany, via Troy, being part of a line from Boston to Albany. The plaintiff put a box of combs in the stage at Leominster, in Massachusetts, directed to "Messrs. Vail & Co., Troy, N. Y.," which arrived safely at Sandlake, and was there taken into the stage of the defendants and carried to Troy, and left at the stage house there, being the only place in Troy where the stage stopped, except at the post office for the delivery of the mail. Notice of the arrival of the goods was not given to, nor were the goods ever received by, the consignees. The stage, in its most direct route to the post office from the stage house, passed the store of the consignees, which was in sight of the stage house, and the consignees were an old-established and well-known firm.

The defendants offered to prove that it was the uniform usage and course of business of this line of stages to leave goods or freight transported by it, directed to Troy, at the stage house there, and not to deliver the same at the residence or place of business of the consignee; that the usage prevailed in the whole course of the line, to leave goods or freight at the usual stopping places of the stage in the towns to which the goods were directed, to be delivered to the consignees when called for, and not to make a delivery of the goods at the places of business of the consignees; and that such was the general custom of the lines of stages throughout the state and country. This evidence was objected to and rejected by the presiding judge. The jury found a verdict for the plaintiff for the value of the combs. The defendants moved for a new trial.

COWEN, J.[1] The offer of the defendants presupposed, what is now

[1] Parts of the opinion are omitted.

conceded, and is indeed extremely well settled, that prima facie the carrier is under an obligation to deliver the goods to the consignee personally.[2] * * * In Barnes v. Foley, 5 Burr. 2711, the question was whether it was the duty of the postmaster at Bath to deliver letters to the inhabitants at their houses. Proof of usage was resorted to, and Mr. Justice Aston said: "The limits of the delivery are to be determined by the usage of the place." [5 Burr.] 2714. And in Rushforth v. Hadfield and Others, 7 East, 224, all the court agreed in the propriety of receiving such evidence to enlarge the rights of carriers. The defendants claimed a lien on the goods, not only for the price of carrying them in particular, but for a general balance due to them for previous carriage. The law denies to the carriers a claim for a general balance; but a long train of evidence was received to show that custom and the course of trade among a particular sort of carriers had overcome the law. The jury found against the defendants; but the evidence was so imposing that they moved for a new trial, as for a finding against the weight of evidence; and the case details all the proofs. The judges proceeded to a full examination of them, and a new trial was denied; but the case shows, and all the judges concur in declaring, the principles on which such evidence is to be received. The cause was tried before Chambre, J., who put it to the jury whether the usage were so general as to warrant them in presuming that the parties who delivered the goods to be carried knew it, and understood that they were contracting with the carriers in conformity to it; if not, the general rule of law would entitle the plaintiffs to a verdict. All the judges concurred that a custom of this kind, which is, quoad hoc, to supersede the general law of the land, should be clearly proved, and the interested encroachments of persons engaged in a particular trade watched with great jealousy. None of them disapproved the qualifications under which the case went to the jury; and Lord Ellenborough, C. J. and Grose, J., put it on the ground of a usage so general, and so uniformly acquiesced in for length of time, that the jury would feel themselves constrained to say it entered into the minds of the parties, and made a part of the contract.

But all this has nothing to do with the abstract question of competency. Usage, when it goes to change the law, always comes in subject to the principles declared in that case; yet if counsel propose to prove such a usage, and think they can establish it, I am aware of no rule which forbids the attempt. * * * It would be too much to say that one delivering goods to a carrier by stage may not expressly, or, which is the same thing, if he knows the usage of the stages to be

[2] In Hyde v. Navigation Co., 5 T. R. 389 (1793), Grose, J., said: "In general, the carrier appoints a porter who provides a cart for the purpose of delivering the goods; but it would be open to an infinity of frauds, if the carrier could discharge himself of his responsibility by delivering them to a common porter, a person of no substance, a beggar, of whose name the owner of the goods never heard, and against whom, in the event of the goods being lost, there could be no substantial remedy."

so, impliedly consent to a delivery at the stopping place, instead of his consignee's place of business. In Hyde v. Trent & Mersey Navigation Company [5 T. R. 389], Lord Kenyon, C. J., went into a very elaborate argument to prove that stagemen and other carriers had this right by the general law. It would, after that, be arrogant to condemn the conventional right as illegal, or contrary to sound policy. I say conventional, because I agree that these cases must be limited by the rule of Rushford v. Hadfield. * * *

In Golden v. Manning, 2 Bl. R. 916, s. c. 3 Wilson, 425, 433 (and see Storr v. Crowley, 1 McClel. & Young, 129), Gould, J., said he thought that all carriers are bound to give notice of the arrival of goods to the persons to whom they are consigned, whether bound to deliver or not. Prima facie this must be so, unless the notice is also dispensed with by the custom. Gould, J., was speaking of this very case of a land carrier; and I do not well see how the carrier can escape the imputation of gross negligence, if he do not, at least, give notice, in order that the consignee may send for the goods. How is he, otherwise, to find out the fact of the delivery? Lord Kenyon, C. J., in the opinion before cited, thought he was to learn it by a letter of advice which should be sent by the consignor. But that cannot always state the place, much less the exact time, of the delivery at the inn. His Lordship suggested that the business of delivery might be left to the innkeeper, who should send his porter. All these things may, I agree, be possibly explained by the custom proposed to be given in evidence.

I do not understand that the defendants here gave any notice to the consignees, although they might have been easily traced by the superscription. They rested everything on the custom. The proposition, therefore, struck me at first as too short. I thought it should have come up to a custom of delivering at the inn, without notice to the consignee. The offer may, for aught I know, be equivalent to that. I should think it essential, either to establish one of the customs as proposed, and follow it with proof of actual notice, [or] to show that the custom dispensed with notice. Such a custom, of such age, uniformity, and notoriety that a jury would feel clear in saying it was known to the plaintiff, I think would be admissible. He would be bound by it, the same as if he had directed a delivery at the inn. And on the offer made and overruled, I therefore think there should be a new trial, the costs to abide the event.[3]

[3] "The contract of the defendants with the plaintiffs was that they would carry the packages in question from Milwaukee to Madison, and deliver them to the consignee [the State Bank] at the proper time and at the proper place, without loss or failure, except by the act of God or of the public enemy; the plaintiffs at the same time undertaking that the consignee, or some proper person on his behalf, should be at the proper place at the proper time to receive the packages, or in default of which, upon due notice, the liability of the defendants as such carriers should cease. It is not denied that a delivery

## PACKARD v. EARLE.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 280.)

Tort against the defendants as common carriers for the loss of a trunk and its contents, intrusted to them to be carried from Providence, Rhode Island, to West Mansfield, Massachusetts, and to be there delivered to the plaintiff.

At the trial in the superior court, before Pitman, J., it appeared that the defendants were express carriers over the line of the Boston & Providence Railroad from Providence to Boston, and intermediate stations; that the trunk was delivered to them at their office in Providence, on Saturday, March 2, 1872, to be carried by them as expressmen to the plaintiff at West Mansfield, a station on the railroad; that it was marked "Henry M. Packard, West Mansfield"; that no special directions as to the delivery were given; that the plaintiff did business in Wrentham, during the week, and was accustomed to spend Sundays at his father's house, about one-half of a mile from the West Mansfield station; that the Boston & Providence Railroad Company had had a depot at West Mansfield for about 20 years, where some of their trains had stopped for receiving and leaving passengers and merchandise; that the defendants and other express carriers on the line of the railroad had been accustomed to deliver and receive at that station, parcels, carried and to be carried by them, employing the station agent and switchtender as their agents; that the amount of express business there was very small; that no messenger had ever been employed there by any express carriers for the delivery of goods; that it had been the uniform course of business of all express carriers to deliver all goods and parcels destined for that place to the station agent, who kept them in the baggage-room, notified the consignees of their arrival, and delivered them when called for at the station. * * *

ENDICOTT, J.[4] It was the duty of the defendants, as common carriers of parcels, to deliver the trunk to the plaintiff personally or at his residence at West Mansfield, and until such delivery their liability

or tender of the packages at 5 o'clock p. m. would have been good in case of a merchant, hotel keeper, or grocer, because that is an hour at which all ordinary business men in Madison are at their places of business. * * * It was, therefore, a fit matter of inquiry for the jury to ascertain by proof what was a proper time, under all the circumstances, to deliver the packages. And we think this matter was properly submitted to the jury." Smith, J., in Marshall v. Am. Exp. Co., 7 Wis. 1, 24, 73 Am. Dec. 381 (1858).

"I do not think it * * * necessary to form an opinion on the question whether a carrier is bound to bring goods for delivery more than once. My impression, however, is strongly in favor of Mr. Campbell's argument on that point. It appears to me to be sufficiently proved by the cases as a general rule that a carrier, having once tendered, has discharged himself of his obligation; because, otherwise, where is his liability to cease?" Alexander, C. B., in Storr v. Crowley, McCleland & Y. 129, 135 (1825).

[4] Parts of the statement of facts and of the opinion are omitted.

as carriers continued. This liability they undertook to limit by proof of a usage in their business to leave packages sent to West Mansfield at the station, with notice to the consignee as a substitute for personal delivery. This was not a general usage of such a character, that a presumption of knowledge arises by mere force of its existence, and which enters into and becomes part of the agreement of the parties. It was a particular usage, local in its application and character, and confined to this station, and, in order to bind the plaintiff, it must be proved that he knew it when he made the contract with the defendants to carry the trunk. The instructions on this point were sufficiently favorable to the defendants. Stevens v. Reeves, 9 Pick. 198; Berkshire Woolen Co. v. Proctor, 7 Cush. 417. * * *

Exceptions overruled.[5]

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## RICHARDSON v. GODDARD.

**(Supreme Court of the United States, 1859. 23 How. 28, 16 L. Ed. 412.)**

GRIER, J.[6] The bark "Tangier, a foreign vessel in the port of Boston," is charged in the libel with a failure to deliver certain bales of cotton, according to her contract of affreightment. The answer admits the contract, and alleges a full compliance with it, by a delivery of the cargo on the wharf, and that after such delivery, a part of the cargo was consumed by fire, before it was removed by the consignees.

The libelants amended their libel, admitting the receipt of 163 bales, and setting forth, as a reason for not receiving and taking away from the wharf that portion of the cargo which was unladen on Thursday, "that, by the appointment of the Governor of Massachusetts, that day was kept and regarded by the citizens as 'a day of fasting, humiliation, and prayer,' and that from time immemorial it has been the usage and custom to abstain from all secular work on that day," and, consequently, that the libelants were not bound to receive the cargo on that day, and that such a delivery, without their consent or agreement, is not a delivery or offer to deliver in compliance with the terms of the bill of lading. * * *

The bark Tangier arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery Wharf; but at the request of the consignees and for their convenience, she "hauled up" at Lewis' Wharf. She commenced the discharge of her cargo on Monday, the 7th, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unlading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the

[5] Compare Southern Ex. Co. v. Holland, 109 Ala. 362, 19 South. 66 (1895).

[6] Parts of the opinion are omitted.

consignees; and, they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting 325 bales, which remained on the wharf overnight. On Thursday morning the wharf was so far cleared that the unlading was completed by 1 o'clock p. m. On that day the libelants took away about 5 bales, and postponed taking the rest till the next day, giving as a reason that it was fast day. About 3 o'clock of this day the cotton remaining on the wharf was consumed or damaged by an accidental fire.

The contract of the carrier, in this case, is "to deliver, in like good order and condition, at the port of Boston, unto Goddard and Pritchard."

What constitutes a good delivery to satisfy the exigency of such a contract will depend on the known and established usages of the particular trade, and the well-known usages of the port in which the delivery is to be made.

A carrier by wagon may be bound to deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions, must therefore be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.[7]

[7] "It does not follow, however, that a delivery of cargo is necessarily a good delivery because within the legal limits of the port. Such is not the meaning or intention of the bill of lading. No one would seriously contend that under a bill of lading like this goods consigned to a merchant in New York City could be lawfully delivered at Spuyten Duyvil, some 13 miles above the Battery, at the mere option of the captain, because Spuyten Duyvil is within the geographical limits of the city and port of New York. * * * A bill of lading is a commercial document, to be interpreted according to the usages of commerce. * * * Consignees of goods at a designated port have a right to expect a delivery of their goods according to the established custom and usage of the port, and in that part of the port customarily used for the discharge of such goods; and the vessel is bound, and has a right, to make

Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfill the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done he is no longer liable on his contract of affreightment.

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them, after full and fair notice. The goods were deposited for the consignees in proper order and condition, at mid-day, on a week day, in good weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless, by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

[The learned judge then considered whether the discharge of cargo from a foreign vessel on fast day was in conflict with the law or usage of the port of Boston, and held that it was not in conflict.]

On the whole, we are of opinion that the bark Tangier has made good delivery of her cargo to the consignees according to the exigency of her bill of lading, and that the decree of the Circuit Court should be reversed, and the libel dismissed, with costs.

delivery accordingly." Brown, J., in Devato v. 823 Barrels of Plumbago (D. C.) 20 Fed. 510, 515 (1884). And see Cargo ex Argos, L. R. 5 P. C. 134, 160 (1873).

"In the absence of evidence of usage, I lay down the rule of law, as I did in another case, that where there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, at least if he be duly and seasonably notified of such preference." Lowell, J., in The Boston, 1 Low. 464, Fed. Cas. No. 1,671 (1870). See, also, Richmond v. Union Co., 87 N. Y. 240 (1881); Constable v. National S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903 (1894); Hewlett v. Burrell, 105 Fed. 80, 44 C. C. A. 362 (1900).

"Delivery upon the wharf, in case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and conveniently accessible to the owners. The Eddy, 5 Wall. (72 U. S.) 495, 18 L. Ed. 486; The Santee, Fed. Cas. No. 12,328. I am clear in the opinion that there was no delivery of the goods in this case, under the rules of law just cited. The goods of the various consignees were piled together in one bulk upon the wharf, under tarpaulins, during a rainy and stormy day, where they could not be fairly said to be open to the inspection of the consignee, and a fair opportunity afforded him to remove his goods. An actual inspection of the goods by the consignee, and their removal by him, are not necessary to a delivery of the goods, but there can be no delivery unless the consignee has the opportunity to inspect and carry away." Woods, J., in Dibble v. Morgan, 1 Woods, 406, Fed. Cas. No. 3,881 (1873). But see, as to the sufficiency of deposit upon

## JARRETT v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, 1898. 74 Minn. 477, 77 N. W. 304.)

CANTY, J.[a] Plaintiff appeals from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action.

It is alleged in the first cause of action that defendant is a common carrier, and that, "for a valuable consideration," it agreed to safely carry from Donnelly, Minn., to Minneapolis, Minn., certain goods, and deliver the same, at the latter place, to John McGregor & Co.; that the goods were the property of plaintiff, and were consigned by him to John McGregor & Co., as commission merchants, to sell the same for plaintiff; and that he then delivered the goods to defendant at Donnelly, pursuant to said agreement with it. It is further alleged "that the defendant did not safely carry and deliver said goods, within a reasonable time, or at all, to said John McGregor & Co., at said city of Minneapolis, or at any other place, or at all, pursuant to said agreement, and did not deliver the same to plaintiff, or any other person, pursuant to plaintiff's order, at said city of Minneapolis, or at all; whereby said hay became wholly lost to this plaintiff, to his damage in the sum of $115.51, no part of which has ever been paid." The second cause of action is similar in form, and need not be noticed further.

* * *

3. The complaint does not allege that plaintiff demanded the goods before bringing this action. It does not appear that it is not in the power of the defendant to deliver the goods, and, for these reasons, the complaint does not, in our opinion, state a cause of action. It is immaterial whether an action of trover is brought or one on contract. In either case, the action must be founded on the same breach of duty by defendant. That breach of duty is the failure to deliver the goods when demanded. It is not the customary duty of a railroad company to tender the goods to the consignee, but the goods are kept at the depot or warehouse until the consignee calls for them.[b] And, before an action can be maintained against such a common carrier, a demand for the goods must be made. Railroad Co. v. Bivens, 13 Ind. 263; Railroad Co. v. Sullivan, 14 Ga. 277; Bird v. Railroad Co., 72 Ga. 655; Gregg v. Railroad Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238; 4 Elliott, R. R. § 1526; 5 Am. & Eng. Enc. Law (2d Ed.) 230. The allegation in the complaint that "the defendant did not safely carry and deliver said goods" is a sort of a negative

the wharf, The Titania, 131 Fed. 229, 65 C. C. A. 215 (1904); Rosenstein v. Vogemann, 184 N. Y. 325, 77 N. E. 625 (1906); Carver, Carriage by Sea, §§ 471, 474. As to the necessity of notice, Carver, Carriage by Sea, § 465.

[a] Part of the opinion is omitted.

[b] For a statement of the reasons for this rule, see Shaw, C. J., in Norway Plains Co. v. B. & M. R. Co., post, pp. 501–502.

pregnant, and does not amount to an allegation that the goods were injured or destroyed in transit, or that there was a failure to deliver them on demand.

The order appealed from is affirmed.[10]

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## LOUISVILLE, N. A. & C. RY. CO. v. HEILPRIN.

(Appellate Court of Illinois, First District, 1900. 95 Ill. App. 402.)

This suit was begun before a justice of the peace by appellee to recover from appellant, a common carrier, its damages by reason of failure of appellant to deliver certain goods consigned to it by appellee for shipment. The goods were not lost, but were delayed in transit, and, when finally at destination, were refused by the consignee because of the delay. Appellee, the consignor, never made demand for return of the goods to it, and the goods still remain in the depot of appellant at the place of destination. * * *

SEARS, J.[11] * * * There was no obligation to return to the consignor unless and until the carrier was directed so to do, and a failure to return was not a conversion of the goods. Hutchinson on Carriers (2d Ed.) § 392.

Until directed by the consignor to do otherwise, it was the duty of appellant, the carrier, to deliver to the consignee, and upon a refusal by the consignee to accept, to hold the goods for further direction by

[10] DUTY OF RAILROAD AS TO NOTIFYING CONSIGNEE.—"It was argued in the present case that the railroad company are responsible as common carriers of goods until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods at the larger places to which goods are thus sent are so numerous, frequent, and various in kind that it would be nearly impossible to send special notice to each consignee of each parcel of goods or single article forwarded by the trains." Shaw, C. J., in Norway Plains Co. v. B. & M. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423 (1854), post, p. 503.

"The rule as to the liability of carriers under the facts stated is well established by the law merchant, and the authorities are numerous which sustain the position that the carrier is bound to pay for the loss of the goods destroyed. It is his duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered the goods, or offered to deliver them to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of or to remove the same." Miller, J., in Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574 (1880).

For the rule on this subject in the various states, see Carriers, 9 Cent. Dig. § 316; 4 Dec. Dig. § 85.

[11] Parts of the statement of facts and opinion are omitted.

the consignor. This the appellant did, and while it may be mulcted in damages for any unreasonable delay in shipment, it cannot, under these facts, be held to respond for the full value of the goods.

The judgment is reversed and the cause is remanded.[12]

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## HARDY v. AMERICAN EXPRESS CO.

(Supreme Judicial Court of Massachusetts, 1902. 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.)

HOLMES, C. J.[13] This is an action for money had and received to recover a sum paid to the defendant for fifty sets of Balzac's works and charges on the same, sent to the plaintiffs by Calman, Levy & Co., from Paris. The goods were to be delivered to the plaintiffs at Boston by the defendant carrier, "C. O. D.," that is to say, on the plaintiffs' paying for the goods and charges.[14] The goods arrived in Boston, and the defendant was notified by the Cunard Company on November 28, 1898, that they showed signs of wet damage. The next day the

[12] In Lesinsky v. Great Western Dispatch, 10 Mo. App. 134 (1881), the defendant carrier, having received goods for carriage to St. Louis and delivery to a connecting carrier for further transportation, stored the goods in its warehouse at St. Louis on the connecting carrier's refusal to receive them, without notice to the shipper or to the ultimate consignee. Thompson, J., said: "It is familiar law that the liability of a carrier does not cease till he has delivered the goods to the consignee, or made a reasonable attempt to deliver them. Where his own route extends to the place of ultimate destination of the goods, and the consignee refuses to receive the goods, he ordinarily discharges himself from liability by storing the goods safely without giving notice to the consignor, although there are some cases which hold that such notice must be given. The reason why such notice is not ordinarily required seems to be that the consignee is presumptively the owner of the goods, the consignor the agent of the owner for the purpose of shipment, and the carrier, in like manner, the agent of the owner. Hutch. on Car. § 108; Briggs v. Railroad Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626. It is, therefore, a case where an agent tenders performance of his contract to his principal, and the latter refuses, in which case there seems to be no good reason why the agent should be held bound to notify a third person of that fact. But the reason of this rule does not apply to the case where the carrier undertakes to transport goods over his own line and deliver them to a connecting carrier to complete the transit. Here, the goods having passed wholly out of sight of both the consignor and the consignee, if, from any circumstance, delivery to the succeeding carrier becomes impossible, the former carrier is under an obvious duty to notify either the consignor or the consignee, unless it is impracticable to do so."

See 9 Cent. Dig. Carriers, §§ 329, 333.

[13] The statement of facts and parts of the opinion are omitted.

[14] "In other words, the direction embodied in the letters C. O. D., placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor." Green, C. J., in Commonwealth v. Fleming, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763 (1889). Compare Chicago, etc., R. Co. v. Merrill, 48 Ill. 425 (1868).

defendant's agent, knowing of this notice but saying nothing about it, called on the plaintiffs, presented a bill, and asked for a check for the amount in controversy. Earlier on the same day the plaintiffs had been notified that the goods were landed and that the money would be needed to get them through the custom-house. The sum was paid in ignorance of any trouble. The goods were not delivered to the plaintiffs until December 1, or later. On December 5 or 6, the plaintiff Hardy returned from abroad, opened the cases and discovered the damage on December 12 or 13, and on December 19 wrote to the defendant that the goods were ruined and could not be used, adding, "We feel justified in putting in a claim for the entire shipment and hold the goods subject to your inspection." Meantime the defendant had advised its Paris office by mail of the payment, and on December 16, before the plaintiffs made their claim, the Paris office had paid Calman, Levy & Co. After discussions and delays the plaintiffs wrote again in April, intimating that they had paid relying on the defendant's saying nothing to show that the books were not in proper condition, and pressing for settlement, as they had lost the use of their money for nearly five months. Later, the defendant disclaimed liability, and this suit was brought. The judge directed a verdict for the defendant and the plaintiffs excepted. * * *

The defendant was entitled to receive its charges from the plaintiffs only in case the plaintiffs accepted delivery of the goods. The defendant itself contends that it collected the price of the goods, which was the larger part of the sum received, as the agent of the consignors. If the defendant knew facts which would have made it wrongful in the vendors to collect the money without disclosing them, it could not retain the money against a seasonable demand, because it received it only in the vendors' right. The right to retain the charges would fall with the right to retain the principal sum. The evidence is less complete than it might be, but it would seem that these goods were at the consignors' risk and were not to be delivered until they reached Boston. Lane v. Chadwick, 146 Mass. 68, 15 N. E. 121; State v. O'Neil, 58 Vt. 140, 158, 2 Atl. 586, 56 Am. Rep. 557; State v. Wingfield, 115 Mo. 428, 437, 22 S. W. 363, 37 Am. St. Rep. 406. It was not disputed that the plaintiffs would have been warranted in refusing to receive them, had they known that they were spoiled. See Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526. The defendant had notice of signs which made it likely that the goods were spoiled, and therefore had notice of the fact as it turned out. By demanding or requesting payment, the defendant affirmed by implication that it had not notice of facts which exonerated the plaintiffs from receiving the goods or paying for them, because it was receiving payment in the right of the consignors who would have been bound to disclose the facts. See Martin v. Morgan, 3 Moore, 635. * * *

But it is said that the plaintiffs should have given prompt notice, and that they did not use reasonable diligence in doing so. We assume that they were bound to use reasonable diligence in that respect, although some of the cases seem to recognize no such rule. See, e. g., Larkin v. Hapgood, 56 Vt. 597. * * *

The court, however, is not prepared to rule upon this as matter of law, but is of opinion that it is a question upon which the jury ought to pass. If the jury should find that notice was given within a reasonable time, the defendant cannot escape on the mere ground that it has paid over. It knowingly has received the money without right, and therefore is under a personal obligation to the plaintiffs, unless and until it is excused by conduct on their part which estops them from setting up their claim. Snowdon v. Davis, 1 Taunt. 359; Townson v. Wilson, 1 Camp. 396; Sharland v. Mildon, 5 Hare, 469; Ex parte Edwards and In re Chapman, 13 Q. B. Div. 747; Moore v. Shields, 121 Ind. 267, 272, 23 N. E. 89.

But a further defense is pressed with force, that there was no offer to return the goods. We agree with the defendant that the plaintiffs were not excused from this by the fact that the defendant was not the vendor. It represented the vendor and also had a right to be reinstated in its own lien. We agree also that the goods were not so absolutely worthless as to excuse the plaintiffs on that ground. Morse v. Brackett, 98 Mass. 205, 209; Snow v. Alley, 144 Mass. 546, 551, 11 N. E. 764, 59 Am. Rep. 119. The plaintiffs said they were worth five or six dollars. But the jury might find, and we cannot say that they would not be justified in finding, that from the beginning the plaintiffs showed that they were willing to give up the goods if they got back their money, and that the defendant indicated plainly enough to excuse them from a tender that it repudiated liability in any form. * * *

Exceptions sustained.[15]

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## McENTEE v. NEW JERSEY STEAMBOAT CO.

(Court of Appeals of New York, 1871. 45 N. Y. 34, 6 Am. Rep. 28.)

The action was brought against the defendants for the conversion of chattels claimed by the plaintiff. The defendants, as common carriers between Albany and New York, received from Mr. Guyer, at Albany, and carried to New York, in 1868, several bundles of sash and blinds addressed to "McEntee," New York. After these arrived at New York, the plaintiff claimed them, and gave evidence tending to prove that he demanded the goods and tendered the charges, and that the agents of the defendants refused to deliver them. The defendants gave evidence somewhat in conflict with the plaintiff's state-

[15] See, also, Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189 (1865).

ment. * * * The judge ruled and decided that the only question for the jury was whether the freight money was tendered. * * * A verdict was rendered at the Kings circuit in favor of the plaintiff for the value of the property, upon which judgment was entered and affirmed on appeal by the Supreme Court, and from the latter judgment the defendants have appealed to this court.

ALLEN, J.[16] The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but, if the refusal was qualified, the question was, whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. Alexander v. Southey, 5 B. & Ald. 247; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Rogers v. Weir, 34 N. Y. 463; Mount v. Derick, 5 Hill (N. Y.) 455. If, at the time of the demand, a reasonable excuse be made in good faith for the nondelivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers, are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Powell v. Myers, 26 Wend. 591; Devereux v. Barclay, 2 B. & Ald. 702; Guillaume v. Hamburg & Am. Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; Duff v. Budd, 3 Brod. & Bing. 177. The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery.[17] The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have

[16] Parts of the statement of facts are omitted.

[17] Acc. Moore v. Balt. & O. R. Co., 103 Va. 189, 48 S. E. 887 (1904), loss of market by delay. But see Allen v. Me. Cent. R. Co., ante, p. 123.

been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner.

The judgment must be reversed and a new trial granted, costs to abide event. All the judges concurring, judgment reversed and new trial ordered.[18]

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## SCOTHORN v. SOUTH STAFFORDSHIRE RY. CO.

**(Court of Exchequer, Hilary Term, 1853. 8 Exch. 341.)**

Assumpsit. The declaration stated that plaintiffs delivered goods to the defendant railway company to be carried for hire, and that defendant promised to deliver them according to plaintiffs' directions; but, though plaintiffs afterward directed defendant to deliver at the Bell Wharf in London, and defendant promised so to do, defendant did not do so, but transmitted the goods to Australia.

At the trial, before Martin, B., it appeared that plaintiffs, who were about to emigrate to Australia, delivered to defendant packages labelled "Scothorn & Co., to the East India Docks, passenger ship, Melbourne, Australia," and paid freight to London. While the goods were in transit, plaintiffs, finding that no berths could be had on the Melbourne, notified a clerk at the London railway station to send the packages to Scothorn & Co., Bell Wharf, London, which the clerk agreed should be done. The goods, however, were sent to the ship Melbourne, and carried to Australia, where they were lost. The jury found that the clerk had authority to receive the countermand, and the judge directed a verdict for plaintiffs, reserving leave to defendant to move to enter a nonsuit.[19]

MARTIN, B.[20] I entirely concur. If the transaction be looked at, the matter is transparent. The plaintiffs send a parcel of goods to the defendants' station, with a direction that the goods shall be delivered on board a ship in the East India Docks. It is said that that is a contract. In one sense it is not. It is the case of a person taking goods,

[18] Compare Atchison, etc., Co. v. Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056 (1906).

It has been held that a carrier may under ordinary circumstances require the production of the bill of lading before delivery. Sellers v. Savannah, etc., R. Co., 123 Ga. 386, 51 S. E. 398 (1905). And see post, p. 190, note. And the giving of a written receipt. Skinner v. Railroad Co., 12 Iowa, 191 (1861); Ayres v. Morris, etc., R. Co., 29 N. J. Law, 393, 80 Am. Dec. 215 (1862).

[19] The statement of facts has been rewritten.

[20] After opinions, which are here omitted, had been delivered by Alderson and Platt, BB. Part of the opinion of Martin, B., is also omitted.

Point of case: D's were instructed to carry to wharf & steamer for Melbourne. P countermanded - lost. D held have held up the goods as any time P ordered them to do so.



to be disposed of according to the directions of another; and could it be contended that, if the latter went an hour afterwards and said, "I have altered my mind; give me back my goods," the former would have a right to reply, "No; you have entered into a contract with me to place them on board a ship, and they shall go?" A carrier is employed as bailee of a person's goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is only bound to deliver goods according to the owner's first directions is a proposition wholly unsupported either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot easily be got at, though it is usually otherwise. But suppose a traveler by railway did not wish to proceed on his journey, and left the carriage and asked for his luggage, which he would clearly have a right to do, if Mr. Gray's argument is correct, the company might say, "No; we have contracted to carry it to the end of the journey, and we will take it on."

It is clear, therefore, that the contract with a carrier is to deliver the goods according to the directions of the owner. * * *

Rule discharged.[21]

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## LONDON & N. W. RY. CO. v. BARTLETT.

(Court of Exchequer, Michaelmas Term, 1861. 7 Hurl. & Nor. 400.)

Case stated on appeal. The case was substantially as follows: The plaintiff, a farmer, orally sold by sample wheat above £10 in value to Badger, a miller near Birmingham, and shipped it by defendant railway company to be delivered to Badger at his mill, paying a freight which included the charge for carrying by van, as the railway made a practice of doing, from the Birmingham station to the mill, a distance of about two miles. As Badger had little warehouse room at the mill, he requested the defendant not to send him wheat from the station without his order. Consequently, when the wheat reached Birmingham, defendant kept it at the station and notified Badger that it was there at his risk. Badger examined the wheat, but gave no order. Some weeks afterward, defendant, learning that Badger had refused to accept the wheat under his contract of purchase, notified the plaintiff

[21] The Martha, (D. C.) 35 Fed. 813 (1888), was a suit in admiralty in which damages were claimed for deterioration and loss by leakage of glycerine in barrels. Benedict, J., said: "The fact being found that the vessel, in October, put into Halifax, a port of distress, in need of repairs, that were not to be completed until the following February; that the consignee of the merchandise offered to take it in Halifax, and pay all the freight provided for in the bill of lading, together with all the expenses incident thereto, and to sign an average bond; and that the shipowner, without a reasonable excuse refused to make such delivery, but, on the contrary, held the goods in the ship until her arrival at the port of New York—the liability of the ship for all damages caused to the libelant by reason of the detention seems clear."

that the wheat was held to await plaintiff's orders, and that if it was not removed storage would be charged. In the meantime the wheat had deteriorated. The trial judge charged that defendant was liable in damages for the deterioration, and plaintiff had a verdict accordingly.

POLLOCK, C. B.[22] The subject has been ably discussed; but it seems to me that the judgment of the court below was wrong, being founded on a notion that the carrier was bound to deliver the wheat at the mill, notwithstanding the distinct and positive order of the consignee not to deliver it there. It is clear that a consignee may receive the goods at any stage of the journey; and, though the consignor directs the carrier to deliver them at a particular place, there is no contract by the carrier to deliver at that place and not elsewhere. The contract is to deliver there unless the consignee shall require the goods to be delivered at another place. Here the wheat was delivered at the place where the consignee desired it to be delivered, and therefore the carrier is not liable.

BRAMWELL, B. I am of the same opinion. I cannot think that the contract between the parties is not only an affirmative contract to deliver at the mill, but also a negative contract not to deliver elsewhere. It would probably create a smile anywhere but in a court of law, if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor. The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor unless the consignee directs them to be delivered at a different place. That being so, all difficulty arising from the statute of frauds is at an end. If, indeed, it could be shown that the consignor would be prejudiced by a delivery at any other place than that named, there might be some reason for implying a contract to deliver at that precise place and no other. But still I should think that immaterial, for how can a carrier's liability be affected by the consideration whether or no there was a written contract between the consignor and consignee? It seems to me that in no point of view is it material to inquire whether the consignor can maintain an action against the consignee. But I cannot help thinking that the consignor is not worse off than he would have been if the contract had been strictly performed; because, whatever right of rejection the consignee had, or within whatever time he was bound to reject, he has neither more nor less than he would have had if the wheat had been delivered at his mill. For these reasons I think that the appeal should be allowed.

Judgment of nonsuit.[23]

[22] The statement of facts has been rewritten.

[23] Channell and Wilde, BB., delivered concurring opinions.

See, also, Sweet v. Barney, 23 N. Y. 335 (1861). In Cork Distilleries Co. v. Gt. So., etc., Co., L. R. 7 H. L. 269 (1874), whisky shipped to vendees at a bonded

## SECTION 2.—TO WHOM DELIVERY SHOULD BE MADE

### BAILEY v. HUDSON R. R. CO.

(Court of Appeals of New York, 1872. 49 N. Y. 70.)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs entered upon a verdict.

Action for the conversion of eleven cases of dry goods. On the 13th October, 1866, plaintiffs received in New York, from Alden, Frink & Western, of Cohoes, an invoice of three cases of goods, consigned to plaintiffs on account of consignors by the defendant's road. Plaintiffs advanced thereon three-fourths of their value, and at the same time loaned Alden, Frink & Western $3,974.13, for which that firm gave their check payable a few days ahead. The check not being paid, it was agreed that Alden, Frink & Western should ship to plaintiffs, to pay the debt, eight more cases of goods. Invoices were sent to plaintiffs, stating the goods were consigned to plaintiffs on account of the consignors.

On the 16th and 17th of October, all the eleven cases were consigned to plaintiffs, and delivered to defendant's agent at Troy, to be by defendant transported to plaintiffs, the defendant at the time giving its receipt, promising and agreeing therein to transport and deliver the goods to plaintiffs, at New York. Instead of delivering the goods to plaintiffs, defendant, without requiring the surrender of its receipts, allowed Mr. Frink, unbeknown to his firm, to change their destination, and, in pursuance of his order, the goods were delivered to Albert Jewett & Co., of New York City, by whom they were sold, and the proceeds paid over to Frink.

The firm of Alden, Frink & Western were at this time insolvent. Plaintiff demanded the goods of defendant's agent in New York. The

warehouse was at their request delivered to them elsewhere, in consequence of which the shipper was compelled to pay the excise. The carrier, who had no notice of the circumstances, was held not liable to the shipper.

A settlement with the consignee for goods lost generally discharges the carrier from liability to the consignor. Scammon v. Wells Fargo & Co., 84 Cal. 311, 24 Pac. 284 (1890).

In Dobbin v. Mich. Cent. R. Co., 56 Mich. 522, 23 N. W. 204 (1885) the consignee wrote to the carrier: "I have no claim on them brick. * * * You can let Mr. Doyle have them." This was considered to justify a direction to the jury that the carrier was not liable to the shipper for delivery to Doyle.

Compare Southern Express Co. v. Dickson, 94 U. S. 549, 24 L. Ed. 285 (1876), in which tobacco known to belong to the shipper was on the order of the consignee delivered to a third person at the place of shipment, and the carrier was held liable.

court, under exceptions of defendant, ordered a verdict for the plaintiffs for the value of the goods.

CHURCH, C. J.[24] * * * It is clear that the consignors delivered the goods to the carrier for the plaintiffs in compliance with their contract to do so. The parol contract was thereby executed, and the title vested in the plaintiffs. The plaintiffs occupied the legal position of vendees after having paid the purchase-money and received the delivery of the goods. But it is unnecessary, in order to uphold this judgment, to maintain that the plaintiffs occupied strictly the relation of vendees. The legal rights of a vendee attach when goods are shipped to a commission merchant, who has made advances upon them in pursuance of an agreement between the parties. * * *

It is urged by the counsel for the defendant that no bill of lading was forwarded or delivered to the plaintiffs, and that until this was done the title remained in the consignors. This is undoubtedly true in many cases; but it is mainly important in characterizing the act of the shipper, and showing with what purpose and intent the goods were delivered to the carrier. If A. has property, upon which he has received an advance from B. upon an agreement that he will ship it to B. to pay the advance or to pay any indebtedness, he may or may not comply with his contract. He may ship it to C. or he may ship it to B. upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. * * *

In this case there was no other bill of lading than the receipt produced in evidence, and no duplicate was taken; but the intention of Alden, Frink & Western to transfer this specific property to the plaintiffs, to be applied upon their indebtedness, conclusively appears by the undisputed evidence: (1) By the agreement the day prior to the shipment. (2) By forwarding invoices of the shipment to the plaintiffs. (3) By making the shipment unconditionally. (4) By retaining the receipt given by the defendant, and neither making nor attempting to make any use of it. * * *

It is urged that the words "on our account," in the invoices, evinced an intention not to vest the title in the plaintiffs. They can have no such effect in this case, even if standing alone and unexplained they might have. A bill of lading for which, as between the parties, the invoices were a substitute, can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency. Grosvenor v. Phillips, 2 Hill, 151; Bank of Rochester v. Jones, 4 N. Y. 501, 55 Am. Dec. 290, and cases cited. The actual agreement and transaction will prevail, and it was proved by two of the members of the firm, and

[24] Parts of the opinion are omitted.

uncontradicted, that the goods were, in fact, shipped in pursuance of the agreement.

Besides, these words are not necessarily inconsistent with the agreement. The goods were not purchased absolutely by the plaintiffs at a specified price, but were to be sold and the avails applied. The relation of the plaintiffs was more nearly that of trustee, having the title, and bound to dispose of the property and apply the proceeds in a particular manner, and the consignors were the cestuis que trust, having the legal right to enforce the terms of the agreement for their benefit. In this sense the property was shipped on their account, and the agreement is consistent with the meaning of those words.

The statute of frauds has no application. (1) There was no sale. (2) If there was, the consideration was paid. (3) The property was specified when the agreement was made as being that which had been and was then being shipped, and the plaintiffs agreed to accept that particular property, and the subsequent delivery to the carrier agreed upon was in legal effect a delivery to the plaintiffs. Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Stafford v. Webb, Lalor, Supp. 217.

The defendant is liable for a conversion of the property. It had receipted the property and agreed to transport safely, and deliver it to the plaintiffs. Instead of complying with its contract, it delivered the property to another person by the direction of one who had no more legal authority over the property than a stranger, without the return even of its receipt. The plaintiffs had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. Willetts v. Sun Mut. Ins. Co., 45 N. Y. 49, 6 Am. Rep. 31; Hawkins v. Hoffman, 6 Hill, 586, 41 Am. Dec. 767; Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607; Story on Bailment, 414; Boyce v. Brockway, 31 N. Y. 490. It was its duty to deliver the property to the real owner. McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28 [ante, p. 146].

Judgment affirmed, with costs.[25]

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## LOUISVILLE & N. R. CO. v. HARTWELL.

(Court of Appeals of Kentucky, 1896. 99 Ky. 436, 36 S. W. 183.)

PAYNTER, J.[26] On the 9th of September, 1892, Hartwell delivered to the appellant for shipment to A. Pennington & Co., of St. Louis, Mo., 170 barrels of apples, for which he received from it a bill of lading. On the day following, Hartwell made a draft in favor of the First National Bank of Elizabethtown, Ky., on the consignees, A.

[25] Compare Chaffe v. Miss. R. Co., 59 Miss. 182 (1881); Lewis v. Galena, etc., R. Co., 40 Ill. 281, 289 (1866).

[26] Parts of the opinion have been omitted.

Pennington & Co., for $300, and at the same time delivered to it the bill of lading. He then notified the appellant not to deliver the apples to the consignee unless he presented the bill of lading and paid the draft which he had drawn in favor of the bank. In violation of Hartwell's order, the appellant delivered to A. Pennington & Co. the apples, without requiring them to present the bill of lading and pay the draft. The bank gave Hartwell credit for the draft, but, Pennington & Co. failing to pay it, this action was brought to recover the amount of it of the appellant. The answer denied that Hartwell was the owner of the apples, and alleged that they were owned by Pennington & Co.

The shipper of goods may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee, or some one for his use.[27] However, this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them. Hutch. Carr. [2d Ed.] § 134. While the consignee in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the owner, unless he has notice to the contrary, when goods are shipped deliverable to the order of the consignor for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the production of the bill of lading, properly indorsed by the consignor. When the goods are thus shipped and deliverable, the carrier must take notice that the consignor intended to retain control of the disposition of the goods. Id. § 130. So, when the shipper gives notice, after they have been received by the carrier for transportation, and before they are delivered to the consignee, that he is not to deliver them to the consignee, he must take notice that the consignor intends to retain control of their ultimate disposition. After such notice the presumption no longer obtains that the consignee is the owner of the goods.

Bills of lading are assignable. When properly indorsed, and delivered with the intention of passing the title to them, it is a constructive delivery of the goods. Id. § 129. In the same way they could be pledged to pay a debt, and thus give the assignee control of the goods. There was no proof as to the value of the apples. * * * The company can only be made to pay the bank such damages as it

[27] "It now becomes necessary to consider the effect of the bill of lading. * * * As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B. instead of to A. This therefore being, as we think it is, the true construction of the bill of lading, and its effect, it is, in our opinion, conclusive against the argument that the property in the sugars was vested in the defendants by the captain's signature of it." Lord Denman, C. J., in Mitchel v. Ede, 11 A. & E. 888 (1840).

sustained, not exceeding in amount the value of the apples, but in no event more than the $300. * * *

The judgment is reversed for further proceedings in conformity with this opinion.

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## NEBRASKA MEAL MILLS v. ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Arkansas, 1897. 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183.)

Action by shipper against carrier for wrongful delivery of the goods. From a judgment for defendant, plaintiff appeals.

RIDDICK, J.[28] The bill of lading under which the meal was forwarded by defendant railway company stipulated that it was to be transported to Altheimer, Ark., and there delivered to the consignee, E. D. Russell. It is admitted that the railway company performed its contract in strict accordance with its terms. But it is said that the consignee, Russell, had not paid for the meal; that the consignor had drawn upon him for the price of the meal, and had forwarded the draft, with the bill of lading attached thereto, to a bank for collection, thus showing an intention that Russell should not have the meal without first paying for it. The answer to this argument is that, if it be true that the consignor did not intend that the meal should be delivered until the payment of the purchase price, yet it is also true that the railway company had no notice of such intention. The meal was billed "straight" to the consignee, and, as the railway company had no notice of the intention of the consignor to retain the ownership and control of the property, it was justified in presuming that the consignee was the owner thereof, and was discharged by a delivery to him at the place specified in the bill of lading. Sweet v. Barney, 23 N. Y. 335; O'Dougherty v. Railroad Co., 1 Thomp. & C. (N. Y.) 477; Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58; McEwen v. Railroad Co., 33 Ind. 368, 5 Am. Rep. 216; Hutch. Carr. § 130; Elliott, R. R. § 1426.

It is argued for appellant that the railway carrier had no right to deliver to the consignee except upon a production of the bill of lading. To this argument we reply that the carrier must deliver in accordance with the bill of lading, and if it delivers without requiring the production of the bill of lading it assumes the consequence of a wrong delivery. But in this case the delivery was made strictly in accordance with the requirement of the bill of lading which evidenced the contract made with plaintiff, and he therefore has no right to complain. * * * In this case the appellant could have protected itself against the failure of the consignee to pay for the meal by making the con-

Point: shipper must give up carrier or he is not for delivery to an insolvent consignee.

[28] The statement of facts has been rewritten, and part of the opinion omitted.

signment to its own order, or, after the meal had been consigned to Russell, it might, upon discovery of his insolvency, have effected the same purpose by stoppage in transitu, and notice to the railway company not to deliver until payment of the draft to which the bill of lading had been attached. But the appellant failed to do this, and the railway company in good faith delivered the meal in accordance with its contract and the directions of appellant, as shown by the bill of lading.

Under such circumstances, it seems to us, notwithstanding the able argument of counsel for appellant, that this claim for damages has neither the letter of the law nor any principle of justice to sustain it. Judgment affirmed.[29]

BATTLE, J., dissents.

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## FORBES v. BOSTON & L. R. CO.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 154.)

MORTON, C. J.[30] The first case is an action of tort, containing a count for the conversion of a quantity of corn and a count for the conversion of a quantity of wheat. As different considerations apply to the two counts, they must be treated separately.

On or about October 20, 1879, Gallup, Clark & Co., grain dealers in Chicago, in response to an order from Foster & Co., forwarded to Boston 50 car loads of corn, by the National Dispatch Fast Freight Line, which is an association of several railroad companies, whose roads made a continuous line from Chicago to Boston, the defendant's road being a part of the line. Upon the shipping of the corn, an inland bill of lading was issued, by which it was consigned to the order of Gallup, Clark & Co., at Boston. Gallup, Clark & Co. drew a draft upon Foster & Co. for the price of the corn, attached to it the bill of

[29] Acc. Nashville, etc., Ry. Co. v. Grayson Bank, 100 Tex. 17, 93 S. W. 431 (1906). Contra, The Stettin, 14 P. D. 142 (1889). In this case Butt, J., said: "According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading." Compare McEwen v. Jefferson, etc., Co., 33 Ind. 368, 5 Am. Rep. 216 (1870), "to be delivered to C. on payment of freight and presentation of duplicate hereof," delivery made without presentation of original or duplicate bill of lading; Viner v. S. S. Co., 50 N. Y. 23 (1872), butter to shipper's order without bill of lading delivered to recipient of letter saying, "The roll I have sent you to-day you will find of good quality;" Colgate v. Pa. Co., 102 N. Y. 120, 6 N. E. 114 (1886), delivery in violation of statute requiring delivery only on surrender of bill of lading; Weyand v. Atch., etc., Ry. Co., 75 Iowa, 580, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504 (1888), delivery to buyer on unindorsed bill of lading "to shipper" sent buyer by way of advice; Louisville, etc., Co. v. Barkhouse, 100 Ala. 543, 13 South. 534 (1892), delivery to P. on unindorsed bill of lading to C., intrusted by C. to P.'s possession; Gates v. C., B. & Q. R. Co., 42 Neb. 379, 60 N. W. 583 (1894), goods consigned to shipper's agent held well delivered at agent's direction to buyer.

[30] Part of the opinion is omitted.

lading, and forwarded both to the Tremont National Bank of Boston. On October 24, 1879, Foster & Co. paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading, Foster & Co. indorsed them to the plaintiffs, as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on October 30, 1879. It remained in its cars until December 12, 1879, when by the orders of Foster & Co. it was shipped on board a vessel for Cork, and exported to Ireland. Foster & Co. did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts, it is too clear to admit of any doubt that, by the transfer of the draft and bill of lading by Foster & Co. to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument, like a bill of exchange, was the representative of the property itself. It was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.[81]

The transaction between Foster & Co. and the plaintiffs was not in form or in effect a mortgage, so that, as contended by the defendant, it must be recorded in order to have validity. It was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds, or a title as pledgees, is not material, as all the authorities show that they took either a general or a special property in the corn, which entitles them to recover of any one who wrongfully converts it. De Wolf v. Gardner, 12 Cush. 19, 59 Am. Dec. 165; Cairo National Bank v. Crocker, 111 Mass. 163; Green Bay National Bank v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Chicago National Bank v. Bayley, 115 Mass. 228; Hathaway v. Haynes, 124 Mass. 311; Gibson v. Stevens, 8 How. 384, 12 L. Ed. 1123; Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214. Numerous other cases might be cited. The delivery of the bill of

[81] "A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. * * * It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." Bowen, L. J., in Sanders v. Maclean, 11 Q. B. D. 327, 341 (1883).

lading was in law the delivery of the property itself, and it was not necessary that the plaintiffs should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. Farmers' & Mechanics' National Bank v. Logan, 74 N. Y. 568; The Thames, 14 Wall. 98, 20 L. Ed. 804; Meyerstein v. Barber, L. R. 2 C. P. 38, 661; Id., L. R. 4 H. L. 317. It is true that the plaintiffs might by their subsequent laches defeat their right to assert their title. If they permitted the property to remain under the control of their assignors, and held them out to the world as having the right to deal with the property, they might be estopped from setting up their title. But the authorities are decisive to the point that, by the transfer from Foster & Co., they took a title as purchasers of the corn which entitles them to maintain this action, unless they have lost the right by their laches, upon proving a conversion by the defendant.

The next question is whether there was a conversion by the defendant. It is settled that any misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. Hall v. Boston & Worcester Railroad, 14 Allen, 439, 92 Am. Dec. 783. By the bill of lading, and by the waybill which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark & Co. The defendant contracted to deliver it to such person as Gallup, Clark & Co. should order, and could not without violating its contract deliver it to any other person.[82] By delivering it to Foster & Co., therefore,

[82] "The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the shipmaster; and in this respect I hold the bill of lading to be assignable." Lord Loughborough, in Lickbarrow v. Mason (Exchequer Chamber, 1790) 1 H. Bl. 357, 359, 360.

"I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. * * * He who delivers a bill of lading, indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him." Buller, J., in Lickbarrow v. Mason, 6 East, 20 (1793), note.

"He [the shipmaster] is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading—in this case Cottam & Co.—or their assigns; that is, assigns of the bill of lading, not assigns of the goods. And I quite assent to what was said in the argument that this means to Cottam & Co. if they have not assigned the bill of lading, or to the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear. He would fulfill the contract if he delivered to Cottam & Co. on their

the defendant became liable for a conversion, unless it shows some valid excuse. Newcomb v. Boston & Lowell Railroad, 115 Mass. 230; Alderman v. Eastern Railroad, 115 Mass. 233. The record before us does not show any laches or any act of the plaintiffs which can excuse or justify this misdelivery. They did not hold Foster & Co. out to the world or to the defendant as one entitled to control the property. Indeed, it is admitted that the defendant did not know, until long after the delivery, that the plaintiffs had any connection with the property, or with Foster & Co. The plaintiffs did nothing to mislead the defendant. They had the right to rely upon the facts that they held the bill of lading, and that, according to the ordinary course of business, the goods could not be obtained except upon its production. The defendant saw fit to deliver them to Foster & Co. without requiring them to produce the bill of lading, relying upon their representation that they were the holders of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs, who have done nothing to mislead or deceive the defendant. We are, for these reasons, of opinion that the defendant is liable for the value of the corn described in the first count of the declaration.[88]

In the case of the wheat, there are some facts proved at the trial which lead us to a different result. By the bills of lading and the waybills, the wheat was consigned to John H. Foster & Co. at Boston. The fact that they did not contain the words "or order," or other equivalent words, so as to make them upon the face quasi negotiable, is not important. The bill of lading was yet the representative of the wheat, and its transfer and delivery to the plaintiffs vested in them the title to the property, as against the consignees and their creditors. But the presiding justice of the superior court who heard the case has found as a fact, "that it was the custom of the railroads terminating in Boston to deliver to the consignee goods 'billed straight' as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the waybills to determine the consignee and the form of the consignment."

custom prevailed here.

producing the bill of lading unindorsed. He would also fulfill his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfill his contract if he delivered them to any one else, though, if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract." Lord Blackburn, in Glyn Mills & Co. v. East & West India Dock Co., L. R. 7 App. Cas. 591, 610 (1882).

[88] Acc. The Thames, 14 Wall. 98, 20 L. Ed. 804 (1871); Midland Nat. Bk. v. Mo., K. & T. Ry. Co., 62 Mo. App. 531 (1895); Southern Ry. Co. v. Atlanta Nat. Bk., 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546 (1902). See, also, First Nat. Bk. v. Northern R. Co., 58 N. H. 203 (1877); Nat. Bk. of Chester v. Atlanta, etc., Ry. Co., 25 S. C. 216 (1886); No. Pa. R. Co. v. Commercial Bk., 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287 (1887); Furman v. U. P. R. Co., 106 N. Y. 579 (1887), goods shipped to seller's order with direction to carrier to notify the buyer.

Under this finding, we must assume that the custom existed, and that the plaintiffs knew or ought to have known of it. It materially affects the relations and rights of the parties. Although it does not affect the question of the title of the plaintiffs as against Foster & Co., it qualifies the duties of the defendant as to the delivery of the wheat. It justified the defendant in delivering it to Foster & Co., the consignees, at least at any time before notice that the property had been transferred. Under it, there was no laches in not calling for the bill of lading; and, in thus delivering, there was no violation of any of the terms of its contract, express or implied. Such delivery therefore was not a misdelivery which would amount to a conversion and render the defendant liable to the plaintiffs.[84] We are therefore of opinion that the defendant is not liable for the value of the wheat sued for. * * *

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## NATIONAL NEWARK BANKING CO. v. DELAWARE, L. & W. R. CO.

(Court of Errors and Appeals of New Jersey, 1904. 70 N. J. Law, 774, 58 Atl. 311, 66 L. R. A. 595, 108 Am. St. Rep. 825.)

SWAYZE, J.[85] This is an action of trover. As finally presented to the trial court, the controversy was limited to eight cars of grain, which had been consigned to one Archer, trading as A. E. Howe & Co. Archer, in pursuance of a practice continued for several years, had surrendered the bills of lading to Remer, freight agent of the defendant at Newark, prior to the arrival of the grain, and had received in exchange therefor what are called "certified orders." The case turns upon the validity and effect of these certified orders.

They were in the following form: "Newark, N. J., Aug. 18th, 1902. Agent D. L. and W. R. R.: On arrival of car oats No. 12043 or its transfer, please deliver same to J. R. Bradner & Son or ourselves or order, on presentation of this order. A. E. Howe & Co. Freight Paid. Invoice No. 47143." Upon surrender of the bill of lading, the cashier in Remer's office stamped across the face of the order the following words: "Car to be delivered on this order same as B. of L. B. of L. taken up at Newark. John Remer, Agt., per J. H. Burrell, Cashier."

Archer had contracted to sell the grain in advance of its arrival, and the name of the purchaser was inserted in the order. After the order was stamped by Burrell, Archer drew a draft on the purchaser, and upon these drafts, accompanied by the certified orders indorsed by

[84] Compare First Nat. Bk. v. No. Pac. Ry. Co., 28 Wash. 439, 68 Pac. 965 (1902).

[85] Parts of the opinion are omitted.

Archer, obtained advances of money from the bank. The practice of issuing these certified orders in lieu of the bills of lading arose from the fact that Archer sold grain by the car load at points along the line of the railroad between Dover and Washington and Newark, and in order to avoid having the grain transported through to Newark, its original destination, the bill of lading was surrendered, and the car transferred, formerly at Dover, but later at Washington, and sent to the station at which it was to be delivered to the customer to whom Archer had agreed to sell it. In August, 1902, Archer absconded.

The eight car loads of grain now in question had then been delivered by the railroad company to the purchasers from Archer, upon his written instructions. The bank held the certified orders, and demanded delivery of the grain, with which demand the railroad company was unable to comply. The terms of the contracts between Archer and the purchasers of the grain do not appear, but in each case the sale was of grain en route, and the drafts drawn upon purchasers by Archer were payable upon arrival of the grain, and the fair inference, in the absence of proof to the contrary, is that Archer was to deliver the grain at Newark. The contracts of sale between Archer and the purchasers antedated the arrangement made by Archer with the bank, and the arrangement with the bank antedated the arrival of the grain. A verdict was directed for the plaintiff for the amount advanced on the drafts. * * *

There was certainly an agreement between the bank and Archer by which the bank obtained a present right in the grain. Parke, B., in Bryans v. Nix, 4 Meeson & W. 775, at page 790. Whether the title of the bank was absolute, or by way of pledge or mortgage, the action is maintainable, and the measure of damages, whether the property was special or general, is the value of the goods. Luse v. Jones, 39 N. J. Law, 707, 713.

The case presents this situation: A consignee sells goods in advance of arrival, and gives an order for their delivery, which is known to the local freight agent of the carrier, and subsequently orders the carrier to deliver the same goods to another person, and the carrier complies with the later order. * * * The position of the bank is not merely that of the true owner, for it has an order of the consignee for delivery of the grain, and there can be no doubt that the carrier, having in its possession the bill of lading, if it had not already delivered the grain, must deliver upon that order.

The question is whether the carrier is protected by the delivery under the later order. Although the duty of the carrier requires a delivery to the true owner when known, it can hardly be disputed that, in the absence of notice of a third person's rights, the carrier would be justified in delivering to the consignee, who is prima facie entitled to receive the goods; and, if it would be justified in delivering to the consignee, it must be justified in delivering on the consignee's order.

The rights of the bank depend upon whether the certified orders were orders for delivery to the bank, and were known to the railroad company prior to the delivery to the other purchasers. Those orders, when presented to Remer, directed a delivery either to the purchaser, or to Archer, or to Archer's order, "on presentation of this order."

The very fact that Archer had the orders stamped with the words "Car to be delivered on this order same as B. of L.," and took them away with him, was notice to Remer that some use was to be made of the orders, other than merely to direct a delivery by the railroad company. Had such been the only purpose, it would have been unnecessary for Archer to have the orders certified or to take them away with him. It would have been enough to leave the bills of lading with the company, and afterwards send such instructions for delivery as Archer actually gave in favor of the subsequent purchasers. By certifying these orders, the agent virtually accepted them. If he was authorized to accept for the company, the company became bound by the acceptance. If he was without such authority, still the terms of the orders gave him notice that the grain was no longer deliverable merely to the consignee or upon his order, but was deliverable only upon the presentation of the certified orders. To that condition the consignee had himself consented, and the railroad company would have been entirely justified in refusing delivery on any other terms.

It is true the certified orders did not name the persons who were to receive the goods, but they described them in such a way that no mistake could be made. The orders amounted to saying: "Deliver the grain to the man who presents this order; it will be either Bradner [or any other purchaser], ourselves, or some one with an order from us." The freight agent, when he indorsed the order, had notice that the grain might not be deliverable to Archer upon its arrival; he also had notice that it should be delivered to some one who would be identified by the possession of the certified order. Such a method of identification was as safe for the railroad company as an identification by name. The agent knew that the person who would be entitled to receive the grain must answer two descriptions: (1) He must have the certified order; (2) he must be either the purchaser named in the order, the consignee himself, or some one with the order of the consignee. The bank complied with both terms of the description; it had the certified order, and the indorsement of Archer thereon.

Notice to the freight agent was notice to the railroad company. It was notice to the very person who was charged by the railroad company with the duty of delivering the grain. The bank's right does not rest solely upon a contract made by the freight agent to deliver the grain to the holder of the certified order. Its right depends upon the facts that it was the true owner of the grain, and the holder of the token which the consignee had notified the railroad company was to determine the question to whom the delivery should be made. * * *

These considerations lead to an affirmance of the judgment.

We have not found it necessary to determine whether a certified order issued in exchange for a bill of lading, as yet unaccomplished, is not in effect a substituted bill of lading, as far as the same is a symbol of the property and transferable by indorsement, nor whether the course of business of the railroad company did not require an inference of Remer's authority to issue such a document of title.

For affirmance—THE CHANCELLOR, FORT, HENDRICKSON, PITNEY, SWAYZE, VREDENBURG.

For reversal—DIXON, GARRISON, VROOM, GREEN.[36]

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## SAMUEL v. CHENEY.

**(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 278, 46 Am. Rep. 467.)**

Tort, against a common carrier, for the conversion of a quantity of cigars. At the trial in the superior court, before Colburn, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

MORTON, C. J. The principal facts in this case, regarded in the light most favorable to the plaintiff, are as follows:

In June, 1881, a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and giving his address as "A. Swannick, P. O. Box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. The plaintiff forwarded the cigars by the defendant, who is a common carrier, and at the same time sent a letter to the swindler, addressed "A. Swannick, Esq., P. O. Box 1595, Saratoga Springs, N. Y.," notifying him that he had so forwarded the goods.

Arthur Swannick

There was at the time in Saratoga Springs a reputable dealer in groceries, liquors, and cigars, named Arthur Swannick, who had his shop at the corner of Ash street and Franklin street, and who issued

[36] See, also, The Thames, Fed. Cas. No. 13,858 (1869); Id., 14 Wall. 98, 20 L. Ed. 804 (1871); Garden Grove Bank v. Humeston, etc., Co., 67 Iowa, 526, 25 N. W. 761 (1885); Nat. Bk. of Chester v. Atlanta, etc., Ry. Co., 25 S. C. 216 (1886); Western, etc., R. Co. v. Ohio Co., 107 Ga. 512, 33 S. E. 821 (1899).

As to the liability of a carrier where goods of different owners have become mixed, so that he cannot tell them apart, see Bradley v. Dunipace, 1 H. & C. 521 (1861). As to his liability where no one can tell them apart, see Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427 (1868). As to his duty where he has given bills of lading for undivided portions of cargo shipped in bulk, a part of which has suffered damage, see Grange & Co. v. Taylor, 20 T. L. R. 386 (1904).

his cards and held out his name on his signs and otherwise as "A. Swannick." He was in good credit, and was so reported in the books of E. Russell & Co., a well-known mercantile agency, of whom the plaintiff made inquiries before sending the goods. No other A. Swannick appeared in the Saratoga Directory for 1881; or was known to said mercantile agency. But in June, 1881, a man hired a shop at No. 16 Congress street, Saratoga Springs, under the name of A. Swannick, and also hired a box, numbered 1595, in the post office, and used printed letter heads with his name printed as "A. Swannick, P. O. Box 1595." This man wrote the letters to the plaintiff above spoken of, and received the answers sent by the plaintiff. He soon after disappeared.

The plaintiff supposed that the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods by the defendant, the packages being directed, "A. Swannick, Saratoga Springs, N. Y."

The defendant carried the packages safely to Saratoga Springs. On July 1st the defendant, by his agent, carried a package of cigars directed to A. Swannick to said Arthur Swannick, who refused to receive it on the ground that he had ordered no cigars. Afterwards, on the arrival of the packages, the value of which is sought to be recovered in this suit, the defendant carried the same to the shop No. 16 Congress street, and delivered them to the person appearing to be the occupant of the shop, and took receipts signed by him as "A. Swannick."

We assume that his real name was not A. Swannick, but that he fraudulently assumed this name in Saratoga Springs and in his dealings with the plaintiff.

The question whether, under these circumstances, the property in the goods passed to the swindler, so that a bona fide purchaser could hold them against the plaintiff, is one not free from difficulty, and upon which there are conflicting decisions. The recent case of Cundy v. Lindsay, 3 App. Cas. 459, is similar to the case at bar in many of its features; and it was there held that there was no sale, that the property did not pass to the swindler, and therefore that the plaintiffs could recover its value of an innocent purchaser.[37] That

[37] In this case, Lord Cairns, after stating the facts, said: "If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question: How is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal.

this case is very near the line is shown by the fact that such eminent judges as Blackburn and Mellor differed from the final decision of the House of Lords. Lindsay v. Cundy, 1 Q. B. D. 348.

But it is not necessary to decide this question, because the liability of the defendant as a common carrier does not necessarily turn upon it. The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an impostor, who by fraud induced the plaintiff to send the goods to him. Dunbar v. Boston & Providence Railroad, 110 Mass. 26, 14 Am. Rep. 576. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.

Suppose, upon the arrival of the goods in Saratoga Springs, the impostor had appeared and claimed them; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, "True, there is another A. Swannick here, but he has nothing to do with this matter; I am the one who ordered and purchased the goods; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. Box, 1595." The defendant would be justified in delivering the goods to him whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.

The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is, that he intended to send them to the man who ordered and agreed to pay for them, supposing, erroneously, that he was Arthur Swannick. It seems to us that the defendant, in answer

**Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever."**

to the plaintiff's claim, may well say, we have delivered the goods intrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence.

The case at bar is in some respects similar to the case of M'Kean v. McIvor, L. R. 6 Ex. 36. There the plaintiffs, induced by a fictitious order sent to them by one Heddell, an agent of theirs to procure orders, sent goods by the defendants, who were carriers, addressed to "C. Tait & Co., 71 George Street, Glasgow." There was no such firm as C. Tait & Co., but Heddell had made arrangements to receive the goods, at No. 71 George street. Upon the arrival of the goods, the defendants, in the usual course of business, sent a notice to 71 George street for the consignee to call for the goods, the notice saying that it ought to be indorsed so as to operate as a delivery order. Heddell indorsed the notice in the name of "C. Tait & Co.," and sent it to the defendants by a carter, to whom the goods were delivered. It was held that the defendants were not liable, upon the ground that no negligence was shown, and that, having delivered the goods according to the directions of the plaintiff, they had performed their duty; and the fact that they delivered to some person to whom the plaintiff did not intend delivery to be made, was not sufficient to make them liable for a conversion. See Heugh v. London & Northwestern Railroad, L. R. 5 Ex. 51; Clough v. London & Northwestern Railroad, L. R. 7 Ex. 26.

The cases of Winslow v. Vermont & Massachusetts Railroad, 42 Vt. 700, 1 Am. Rep. 365, American Express Co. v. Fletcher, 25 Ind. 492, and Price v. Oswego & Syracuse Railway, 50 N. Y. 213, 10 Am. Rep. 475, differ widely in their facts from the case at bar, and are distinguishable from it.

Upon the facts of this case, we are of opinion that the defendant is not liable, in the absence of any proof of negligence; and therefore that the rulings at the trial were sufficiently favorable to the plaintiff.[38]

Exceptions overruled.[39]

[38] The plaintiff requested the judge to rule that on the facts, which were undisputed and agreed, he was entitled to a verdict. The judge refused so to rule. The plaintiff then requested the judge to rule that, if the jury believed that in shipping these goods the plaintiff intended as the consignee A. Swannick, the person who was well rated in the commercial agency books, and that

[39] Acc. Bush v. St. Louis, etc., Ry. Co., 3 Mo. App. 62 (1876); The Drew (D. C.) 15 Fed. 826 (1883); Wilson v. Adams Ex. Co., 27 Mo. App. 360 (1887). Compare Price v. Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475 (1872), stated post, p. 170; also Sword v. Young, 89 Tenn. 126, 14 S. W. 481, 604 (1890), swindlers using fictitious names; Oskamp v. So. Ex. Co., 61 Ohio St. 341, 56 N. E. 13 (1899). A carrier has been held liable for delivering to a consignee with reason to know him a swindler. Wilson v. Adams Ex. Co., 43 Mo. App. 659 (1891); Pacific Ex. Co. v. Critzer (Tex. Civ. App.) 42 S. W. 1017 (1897). And see Southern Express Co. v. Dickson, 94 U. S. 549, 24 L. Ed. 285 (1876).

## PACIFIC EXPRESS CO. v. SHEARER.

(Supreme Court of Illinois, 1896. 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324.)

This was an action for misdelivery of a package containing $4,000. The plaintiffs did business at the stockyards in Chicago. They had had dealings with one J. C. Stubblefield, a traveling cattle buyer, and from time to time at his request had advanced him money by draft, letter of credit, or express.

Plaintiffs received the following telegram:

"Chetopa, Kan., April 22, 1889.

"To W. W. Shearer & Co., Union Stockyards, Chicago:

"Express me $4,000 to-day, Chetopa. Answer.

"J. C. Stubblefield."

The telegram was not sent by the Stubblefield whom plaintiffs knew, but by a swindler who had arrived at Chetopa the day before upon the same train with Stubblefield, and who, under the name of J. C. Stubblefield was stopping there at a hotel.

Plaintiffs answered as follows:

"Union Stockyards, Chicago, Ill., 22.

"To J. C. Stubblefield:

"Sent money as ordered to-day. Wire me full particulars on receipt of this. W. W. Shearer."

This was delivered to the swindler, and he replied:

"Chetopa, Kan., 22.

"To W. W. Shearer & Co.:

"Bought 240 corn fed Texas, top of 300, at $20 a head.

"J. C. Stubblefield."

April 24th the swindler called at the office of the defendant express company, introduced himself as J. C. Stubblefield, and asked for a package addressed to him, informing the agent correctly that it was from Shearer & Co. and contained $4,000, and in response to a request that he identify himself, producing the telegram he had received and two accounts of sales showing transactions between J. C. Stubblefield and Shearer & Co. He also brought in the landlord of his hotel, who

that intent was properly expressed in the address on the packages, and that the name of the person to whom delivery was in fact made was not A. Swannick, they must find a verdict for the plaintiff. The judge refused so to rule, and instructed the jury that, the intent of the plaintiff being uncommunicated to the defendant, except so far as expressed in the address on the packages, was of itself of no importance; and that if the delivery was made to a person who was known at Saratoga Springs by that name and no other, that was enough, so far as the question of name affected the legal result. The judge then left the single question to the jury, as to whether the defendant acted negligently in making the delivery he did, instructing them further that, although there was no question that there was a misdelivery of the goods in suit, the only question was, whether the defendant was guilty of negligence in making this misdelivery.—Rep.

told the agent that the swindler was known as J. C. Stubblefield, was making a trade for cattle west of the town, and had, as was true, ordered cattle cars to be in readiness for a shipment to be made that day, and that the cars were ready. The agent then delivered the package to the swindler.

The jury were instructed, in effect, that, unless the person to whom delivery was made was in fact J. C. Stubblefield, the defendant was liable, though it had used reasonable diligence to ascertain his identity, and though he was the person in response to whose telegram the package was sent. From a judgment for plaintiff, defendant appeals.

CRAIG, C. J.[40] * * * It is apparent from the record that the package was delivered to the person in response to whose telegraphic order appellees sent the package, appellees at the time believing such person to be J. C. Stubblefield; and it is, no doubt, also true that, at the time of delivery, the agent of appellant ascertained that the person who demanded the package, and to whom it was delivered, was the person in response to whose order appellees sent the same, and that appellees treated the order for the money as the order of J. C. Stubblefield; and it may also be true that the agent used reasonable diligence to ascertain the identity of the person who demanded the package before it was delivered. Would these facts relieve the carrier of liability for delivering the package to a person to whom it was not consigned?

In Hutchinson on Carriers, § 344, the rule with reference to delivery is stated as follows: "No circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind, and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned." * * *

In American, etc., Exp. Co. v. Milk, 73 Ill. 224, an action was brought against the company to recover for a package of money delivered to the company in Du Page county, to be forwarded to Kankakee. When the package arrived at its destination, the agent of the company delivered it to a certain person on a forged order of the consignee. It was held that it is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee, and the only way it can relieve itself from responsibility as a common carrier is by showing performance, or its prevention by the act of God or the public enemy, and that it is

[40] The statement of facts has been rewritten, and parts of the opinion omitted. A dissenting opinion by Phillips, J., is also omitted.

not discharged by delivering the same to another on a forged order of the owner. The same doctrine is announced in American, etc., Exp. Co. v. Wolf, 79 Ill. 430.

The decisions of this court are believed to be in harmony with the law as declared in the text-books and as announced by a large majority of the courts of last resort of the country. The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is the real person to whom the goods have been consigned, and the carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care.[41] The business interests of the country, as well as the rights of a consignor who pays a liberal price for the transmission of his property, alike demand that the carrier should be held to a strict accountability.

There are a number of cases in the books where a delivery of goods has been made by the carrier to the wrong person under circumstances not unlike the facts under which the money was delivered here, where the carrier was held liable. In American Exp. Co. v. Fletcher, 25 Ind. 493, a person pretending to be J. O. Riley called on the telegraph operator and agent of the express company and sent a telegram to plaintiff requesting a certain sum of money by express. In a short time, the same agent received by express a package of money addressed to J. O. Riley. The person who had sent the telegram for the money called on the agent and operator and demanded the package of money, which was delivered over to him. Subsequently, it turned out that the person who sent the telegram and to whom the money was delivered was not J. O. Riley, and the express company was held liable for the money. In the decision of the case, the court, among other things, said: "The express undertaking of the appellant was to deliver the package to J. O. Riley in person. The

[41] Acc. Cavallaro v. Tex. & Pac. Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94 (1895), delivery to impersonator of consignee; Sinsheimer v. N. Y. Cent. R. Co., 21 Misc. Rep. 45, 46 N. Y. Supp. 887 (1897), to finder of receipt; Adrian Knitting Co. v. Wabash Ry. Co., 145 Mich. 323, 108 N. W. 706 (1906), to consignee's former partner holding bill of lading; So. Ex. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254 (1906); Cane Belt R. Co. v. Peden, etc., Co., 45 Tex. Civ. App. 630, 101 S. W. 528 (1907), to consignee company's director holding bill of lading.

Where a consignee cannot be found, or refuses to accept, the carrier, acting as agent for the owner, may store the goods with a warehouseman as bailee for the owner, and is not liable thereafter even for the warehouseman's negligence, at least where the owner has notice. Manhattan Shoe Co. v. C., B. & Q. R. Co., 9 App. Div. 172, 41 N. Y. Supp. 83 (1896).

Where a consignee cannot be found, and the carrier holds the goods in his own warehouse for the owner's benefit, whether he is liable for a misdelivery without negligence, see Heugh v. London & N. W. Ry. Co., L. R. 5 Ex. 51 (1870); Burnell v. N. Y. Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61 (1871); Lake Shore R. Co. v. Hodapp, 83 Pa. 22 (1877); Security Trust Co. v. Wells, Fargo & Co., 80 N. Y. Supp. 830, 81 App. Div. 426 (1903), affirmed 178 N. Y. 620, 70 N. E. 1109 (1904); 6 Cyc. 473, note 52.

utmost that the answer alleged was, that the delivery was to another person who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name. This was no better evidence that his name was Riley than if he had so stated to the express agent or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley simply proved that Riley had credit, or some arrangement with the plaintiff to furnish him money, and that the package was sent to him—not that he was the person who sent the dispatch or that anyone pretending to be him was to receive it."

Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107, is another case in point. There an instruction had been given which was, substantially, that the express company, without reference to the party who may have ordered the money sent or who may have telegraphed for it, was bound to deliver to the plaintiff if it was sent to him and he was the owner. On behalf of the express company, it was insisted that the instruction did not announce a correct rule of law, but the court held otherwise, and said: "This instruction, viewed in reference to the testimony, is nothing more than that a forged telegram is no excuse for the delivery to a party not the owner and to whom it was the contract of the carrier to deliver it. * * * Notwithstanding the forged telegram, this carrier, in making a personal delivery, was bound by law to deliver to the person to whom the package was addressed, he being its true owner. It is the settled doctrine of England and this country that there must be an actual delivery to the proper person, * * * and in no other way can the carrier discharge his responsibility, except by proving he has performed such engagement or has been excused from performance, or been prevented by the act of God or a public enemy." See, also, American Exp. Co. v. Stack, 29 Ind. 27.

Price v. Oswego, etc., Ry. Co., 50 N. Y. 213, 10 Am. Rep. 475, is an interesting case on the question. There the person who ordered the goods in the name of a fictitious firm, S. H. Wilson & Co., was the same person who received and receipted therefor in the name of such fictitious firm. It seems that the referee found "that the delivery by the carrier was to the same person who made the order for the goods," and he also found, as a conclusion of law, that the delivery to such person, without notice of fraud, relieved the carrier of liability. But the court of appeals reversed the judgment and held the carrier liable, and, among other things, said: "It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods, or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to

him would not protect the carrier any more than if made to any other person."

Duff v. Budd, 3 Brod. & B. 177, 7 Eng. Com. L. 399, is also a case in point. There the person who received the goods was the same who ordered them in a fictitious name, but it was held the carrier had no authority to deliver them to such person, and the owner was entitled to recover of the carrier.

Dunbar v. Boston, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576, and Edmunds v. Merchants', etc., Co., 135 Mass. 283, are relied upon by the appellant to sustain the delivery of the package. In the first case cited, one John F. Gorman called on Dunbar, in Boston, and represented that he was John H. Young, of Providence, Rhode Island. He purchased on credit a quantity of goods, and had them consigned to John H. Young, Providence, Rhode Island. Upon the arrival of the goods in Providence, Gorman, who had made the purchase in person, presented himself to the carrier, and, as the agent of Young, demanded the goods. The goods having been delivered to him, Dunbar sued the carrier for a misdelivery, but the court held that the action would not lie. The decision, as we understand it, is predicated on the ground that the goods were consigned and delivered to the person who actually, in person, made the purchase under an assumed name. In the other case it appeared that "a swindler, claiming to be Edward Pape, of Dayton, Ohio, purchased goods from plaintiff by personal negotiation. There was a man whose true name was Edward Pape, in Dayton, Ohio—a reputable business man, whom the plaintiff supposed the swindler to be. The goods were delivered by plaintiff to the defendant, to be carried to Dayton and delivered to Edward Pape. The defendant delivered to the swindler." The court held that the carrier was not liable. In the opinion the court said: "The sale was voidable by the plaintiff, but the carrier, by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the directions upon the package, and who was the person to whom the plaintiff sent them." There is a marked distinction between these cases and the one under consideration, and they cannot control here.

Another case relied upon is Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467 [ante, p. 163]. That case, in its facts, is more like the one under consideration than any that has been cited by appellant, and it seems to sustain the position of appellant. But while we recognize the ability of the court in which the case was decided, we do not regard the rule laid down as the correct one, and we are not inclined to follow it.

Some other cases have been cited in the argument of counsel, but it

will not be necessary to refer to them here. The cases bearing on the question are not entirely harmonious, but the rule adopted in this state and in the courts of many other states, that the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned, is, as we think, the only safe rule to be adopted. This rule gives protection to the consignor, who pays his money to the carrier to transport and deliver goods to the consignee, and at the same time imposes no unreasonable responsibility on the carrier. When money or goods have been delivered to a carrier to be carried and delivered to a certain named person, when they reach their destination it is the business of the agent of the carrier to deliver to the real person to whom they are consigned, and, as said by Hutchinson, no circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. Where the consignee is unknown to the agent of the carrier, it is his duty to hold the goods until the consignee furnishes ample proof that he is the person to whom the goods were consigned.

When Shearer & Co. received a telegram from J. C. Stubblefield, and forwarded a package of money directed to J. C. Stubblefield, they supposed and believed the order came from the man with whom they had previously had dealings and with whom they were personally acquainted, and, when they delivered the package to the carrier, it was consigned to him. The fact that an impostor had sent a telegram in the name of J. C. Stubblefield, and a reply to J. C. Stubblefield was returned which was delivered to the impostor, did not authorize the agent of the carrier to deliver the package directed to J. C. Stubblefield to an impostor representing that he was J. C. Stubblefield. Here the package of money was consigned to J. C. Stubblefield, and the carrier was directed to deliver the money to him and to him only. This was not done. The money was never delivered to J. C. Stubblefield, but the agent of the carrier delivered it to an impostor, and for a failure to deliver the package to J. C. Stubblefield the carrier is liable.

The judgment of the Appellate Court will be affirmed.[42]

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## SINGER v. MERCHANTS' DESPATCH TRANSP. CO.

**(Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 635.)**

Action in tort and contract for the value of three cases of boots and shoes delivered to the defendant for carriage. The case was tried without a jury, and comes up on facts agreed by the parties and on findings by the trial judge. The plaintiff, Louis Singer of Boston, shipped the goods in question to fill an order from one Guralnik of

[42] Acc. American Ex. Co. v. Stack, 29 Ind. 27 (1867). See, also, Wernwag v. Railroad Co., 117 Pa. 46, 11 Atl. 868 (1887).

Springfield, Ill. The cases were marked "L. Singer, Springfield, Ill." Plaintiff accepted a receipt which provided that the goods should be delivered to L. Singer, Springfield, Ill., and might, at the carrier's option, be delivered without the production of the receipt. Plaintiff indorsed the receipt and attached it to a draft for the price of the goods, which he sent to Springfield through his bank, with instructions to notify Guralnik. The cases were delivered at Springfield to Lena Singer, who had a shoeshop there.

The trial judge found that defendant, in delivering to a person who produced no receipt, was negligent in not making effort to ascertain that she was the person intended by the shipper.

LORING, J.[48] The contract of the defendant in the case at bar was to deliver the cases in question to L. Singer, Springfield, Ill., without requiring the production of a receipt or bill of lading.

By accepting the receipt, which states the conditions upon which the property is received, the plaintiff accepted those terms as part of the contract. Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Hoadley v. Northern Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; Fonseca v. Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660 [post, p. 418]. The receipt in question states on its face that these conditions are to be found on the back. Such a receipt comes within that rule. See in this connection Pemberton Co. v. New York Central Railroad, 104 Mass. 144; Doyle v. Fitchburg Railroad, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417. By force of this contract between the parties the case at bar is brought within the rule applied on proof of custom in Forbes v. Boston & Lowell Railroad, 133 Mass. 154 [ante, p. 156].

The defendant performed this contract by delivering the goods to L. Singer, Springfield, Ill.

Whether the consignor in the case at bar meant L. Singer of Boston, Mass., or L. Singer of Springfield, Ill., is not material. What a consignor in fact means if not communicated to the carrier is not material. The rights of the parties depend upon what is communicated to the carrier. Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467 [ante, p. 163]. The carrier in making delivery is bound to follow that direction whatever it may mean under all the circumstances of the case.

It is agreed that the Lena Singer to whom the goods were delivered was, before and at the time in question, doing business in Springfield, Ill., under the name of L. Singer, and was so known to the defendant's representatives in Springfield; also that she had been receiving goods over the defendant's line "nearly every week, addressed to L. Singer," and that "these cases were marked and billed in the same manner as other goods received at Springfield for said Lena Singer." It does not appear that there was any other L. Singer in Springfield.

[48] The statement of facts has been rewritten.

Under these circumstances we see no ground for saying that the defendant did not follow the instructions given to him in delivering the goods to Lena Singer.

We cannot accede to the plaintiff's argument that because the defendant's agent in Boston had notice of the name of the consignor and consignee being the same he had notice that the goods were to be delivered to the consignor and therefore that L. Singer, Springfield, Ill., meant L. Singer of Boston. If any inference ought to have been drawn from this fact we think it was that L. Singer of Springfield was the consignor acting through an agent in making the consignment.

Neither is it material that "the plaintiff had been doing business in Boston for eleven years, and had been sending goods to Springfield, Ill., for about five years prior to November 21, 1900, about six or seven times a year to the same Guralnik, and had always sent his goods addressed in the same way, namely, L. Singer, Springfield, Ill., and through the defendant company, and he never had any trouble before this time." The defendant's agent in Springfield was not bound to remember and was not chargeable with knowledge of these facts. See in this connection Raphael v. Bank of England, 17 C. B. 161; Vermilye v. Adams Express Co., 21 Wall. 138, 22 L. Ed. 609; Seybel v. Nat. Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583, where it is held that previous notice of loss to a subsequent purchaser of a negotiable security does not charge him with knowledge of the facts stated in the notice. Whether this is the law in Massachusetts was left open in Hinckley v. Union Pacific R. R., 129 Mass. 52, 59, 37 Am. Rep. 297.

The issues of negligence on the part of the plaintiff and on the part of the defendant, on which the judge below tried the case, were not the issues on which the rights of the parties in the case at bar depend. Where the instructions as to delivery are doubtful under the circumstances known to the carrier, he is put on his inquiry, and the question of negligence arises. But the instructions here were not doubtful under the circumstances known to the defendant. The judge in the court below apparently acted on Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467. There was ground for arguing that instructions there were doubtful under the circumstances known to the carrier. It is to be observed that the charge to the jury in that case was held to have been "sufficiently favorable to the plaintiff"; it was not held to have been correct.

The conclusion to which we have come is supported by Dunbar v. Boston & Providence R. R., 110 Mass. 26, 14 Am. Rep. 576; Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467; McKean v. McIver, L. R., 6 Ex. 36 [ante, p. 166]; Stimson v. Jackson, 58 N. H. 138; Conley v. Canadian Pacific Ry., 32 Ont. 258; The Drew (D. C.) 15 Fed. 826; Nebraska Meal Mills v. St. Louis Southwestern Ry., 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183 [ante, p. 155].

The plaintiff evidently intended to make the goods shipped security for his draft for the unpaid balance of the purchase money due him. To do that he should have had the goods billed to his own order and then indorsed the bill of lading to the bank discounting his draft. By mistake he billed the goods "straight" and is now seeking to make the defendant liable for his own blunder.

In the opinion of a majority of the court the entry must be:

Exceptions sustained.[44]

[44] Acc. The Drew, 15 Fed. 826 (1883). But see Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116 (1878).

## CHAPTER IV

## WHO MAY SUE FOR BREACH OF THE CARRIER'S UNDERTAKING

### FINN v. WESTERN RAILROAD CORPORATION.

(Supreme Judicial Court of Massachusetts, 1873. 112 Mass. 524, 17 Am. Rep. 128.)

Contract against the Western Railroad Corporation as a common carrier for failure to forward and deliver shingles to Joseph S. Clark at Westfield. The plaintiff, having received from Clark an order for a quantity of shingles, shipped them by canal boat and took from the master a receipt which stated that they were to be delivered to the Western Railroad Company at Greenbush. They were so delivered, and were there destroyed by fire. The railroad company's agent at Greenbush testified that he refused to receive the shingles except for storage, because he did not know the name or address of the person for whom they were intended. The jury found, however, that he saw the full name and address of Clark upon the bundles, and gave a verdict for plaintiff. Defendant excepted to the court's refusal to give certain instructions based upon the theory that title to the shingles had passed to Clark, and that, if so, plaintiff could not recover.

Read all

WELLS, J.[1] The only question argued by the defendant, upon these exceptions, is whether the action for loss of the property can be maintained by and in behalf of Finn. It is contended that if there was a delivery, with proper directions for the transportation, so as to charge the defendant with responsibility as carrier, then the title in the property had passed to Clark, the consignee; and the right of action for injury to it was in him alone. On the other hand, if proper directions for its transportation had not been given, then the defendant is not liable at all as carrier, according to the former decision in 102 Mass. 283. It is not contended that the defendant is liable as warehouseman. In either aspect of the case, upon this view of the law, no recovery could be had by Finn.

The jury having found that the defendant became responsible as carrier, the case is now presented only in that aspect. We think also that the facts, as disclosed by the present bill of exceptions, show that the title to the property had passed to Clark before the loss occurred; leaving in Finn at most only a right of stoppage in transitu.

The liabilities of a common carrier of goods are various; and when not controlled by express contract, they spring from his legal obliga-

[1] The statement of facts has been rewritten.

tions, according to the relations he may sustain to the parties either as employers, or as owners of the property. Prima facie, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. His obligation to carry safely, and deliver to the consignees, subjects him to liabilities for any failure therein, which may be enforced by the consignees or by the real owners of the property, by appropriate actions in their own names, independently of the original contract by which the service was undertaken. Such remedies are not exclusive of the right of the party sending the goods, to have his action upon the contract implied from the delivery and receipt of them for carriage. This, in effect, we understand to be the result of the elaborate discussion of the principles applicable to the case in Blanchard v. Page, 8 Gray, 281. That decision may not be precisely in point, as an adjudication, to govern the case now before us; for the reason that there was a written receipt or bill of lading for carriage by water, and the plaintiffs were acting in the transaction as agents for the owners of the goods; yet the general principles evolved do apply, and are satisfactory to us for the determination of the present case.

When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods; or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them—a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction, we think, must determine whether the right of action upon the contract of service, implied from the delivery and receipt of goods for carriage, is in the consignor or in the consignee. In the case of Blanchard v. Page the action was maintained in the name of the consignors, who were merely the agents of the owners in forwarding the goods. But that was explicitly on the ground of the express contract with them, embodied in the receipt or bill of lading.

As already suggested, the consignee, by virtue of his right of possession, or the purchaser, by virtue of his right of property, may have an action against the carrier for the loss, injury, or detention of the goods, though not party to the original contract. Such action is in tort for the injury resulting from a breach of duty imposed by law upon the carrier; or, in the language of the early cases, upon "the custom of the realm."

There are many cases, both in England and in the United States, in which the doctrine appears to be maintained that, except when there is a special contract, a remedy for injury resulting from breach of duty by a carrier can be had only in the name and behalf of some one having an interest in the property at the time of the breach, which is injuriously affected thereby.

The rule might well be conceded, if the exceptions were not too restricted. It will hold good in actions of tort, because they are founded upon injury to some interest or right of the plaintiff.[2] And the cases which support this view are mostly, if not altogether, actions of tort. This is true of the leading early case from which the doctrine is mainly derived, Dawes v. Peck, 8 T. R. 330; also of Griffith v. Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444; Green v. Clark, 5 Denio (N. Y.) 497; Id., 13 Barb. (N. Y.) 57; and Id., 12 N. Y. 343; and does not appear from the report to be otherwise in Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402. In discussing the grounds of decision it seems to have been assumed by various judges, as we think, erroneously, that the right of recovery necessarily involved the question with whom the original contract of service was made. And the effort to make the inference of law as to that contract conform to what was deemed the proper decision as to the right to recover for the injury, has led to some statements of legal inference which appear to us to be somewhat overstrained. Thus in Dawes v. Peck it is said by Lawrence, J., that, in the payment of freight by the consignor, he is to be regarded as the agent of the consignee; that the carrier generally knows nothing of the consignor, but looks to the person to whom the goods are directed. In Freeman v. Birch, 1 Nev. & Man. 420, it is said by Parke, J., "In ordinary cases the vendor employs the carrier as the agent of the vendee." In Green v. Clark, 13 Barb. (N. Y.) 57, it is said by Allen, J., that when the consignee is the legal owner, or the property vests in him by the delivery to the carrier "it is an inference of law, and not a presumption of fact, that the contract for the safe carriage is between the carrier and consignee, and consequently the latter has the legal right of action." But in the same case in the Court of Appeals (12 N. Y. 343) it was regarded as immaterial by whom the contract was made, and whether

[2] It has been held that a consignor without interest in the goods may not maintain an action in tort for breach of duty as common carrier, though a party to the contract of carriage. No. Pac. Ry. Co. v. Lewis, 89 Ill. App. 30 (1900). But a bailee shipping to his agent may sue in tort. Gt. Western Ry. Co. v. McComas, 33 Ill. 186 (1864); U. S. Express Co. v. Council, 84 Ill. App. 491 (1899); Walter v. Ala., etc., Co., 142 Ala. 474, 39 South. 87 (1904). So may one to whom goods are consigned under a contract for sale by him on commission. Boston & Me. R. Co. v. Warrior Co., 76 Me. 251 (1884); Mo. Pac. R. Co. v. Peru-Van Zandt Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468 (1906). But see Cobb v. I. C. R. Co., 88 Ill. 394 (1878). An owner may sue in tort, though neither consignor nor consignee. Fast v. Canton, etc., R. Co., 77 Miss. 498, 27 South. 525 (1899).

the plaintiff was consignor or consignee, for the purposes of an action of case for negligence by which his property was injured.

In Griffith v. Ingledew, the dissenting opinion of Gibson, J., assuming that the contract of carriage formed the basis of the action, combats with great force of reasoning the proposition that a contract with the consignee is the legal result of the receipt of goods by a carrier, when no privity with or authority from the consignee is shown, and none professed by the consignor at the time, unless the direction of the goods to the address of the consignee can be taken to be such profession.

The whole force and effect of the reasoning in Blanchard v. Page is in the same direction. The ordinary bill of lading or receipt, given to the consignor by the carrier, simply expresses what is the real significance of the transaction independently of the writing. There is no reason for giving a different interpretation to, or drawing a different inference from, the acts of parties, because of a writing which is nothing but a voucher taken to preserve the evidence of those acts.

Whatever remedy is sought in contract must necessarily be sought in the name of the party with whom the contract is entered into, whether it be special, that is, express, or implied. The question then is simply this: In the absence of an express agreement, with whom is the carrier's contract of employment and service in respect of goods delivered to him by the seller to convey to the purchaser, when there is no privity or relation of agency between the carrier and the purchaser save that which springs from possession of the goods, and the seller has no authority to make a contract for the purchaser except what is to be implied from the agreement of purchase or the order for the goods?

The law imposes upon the carrier the duty to transport the goods, allows him a reasonable compensation, and gives him a lien upon the goods for security of its payment. It also implies a promise on the one part to carry and deliver the goods safely, and, on the other, to pay the reasonable compensation. These two promises form the contract. Each is the counterpart and the consideration of the other. If the contract of carriage is with the consignee, the reciprocal promise to pay the freight must be his also. Against this inference are the considerations that the seller is acting in his own behalf in making the delivery, and the goods remain his property until the contract with the carrier takes effect. The title of the purchaser does not exist until that contract is made. It follows as a result.

The carrier is not agent for either party, but an intermediate, independent principal. If made an agent of the consignee, his receipt of the goods cuts off the right of stoppage in transitu on the one hand, and satisfies the Statute of Frauds on the other. He has a right to look for his compensation to the party who employs him, unless satisfied from his lien. The fact that, as between seller and purchaser, the purchaser must ordinarily pay the expenses of transportation as a

part of the cost of the goods, does not affect the relations of contract between the carrier and either party. We discover nothing in the nature of the transaction, and we doubt if there is anything in the practice or understanding of the community which will justify the inference that one to whom goods are sent by carrier, without direction or authority from him, other than an agreement of purchase or consignment, is the party who employed the carrier and is bound to pay him; unless he assumes such liability by receiving the goods subject to the charge.

The contract is made when the goods are received by the carrier. If it is then the contract of the consignee, it will not cease to be so, and become the contract of the consignor, by reason of subsequent events. Suppose, then, the seller exercises his right of stoppage in transitu. Is the purchaser still liable to the carrier for the unpaid freight? Suppose the contract of sale to be without writing and within the Statute of Frauds. The contract of the carrier is not within the statute, and the authority to the seller to make such contract in behalf of the purchaser need not be in writing. Is the carrier to look to the purchaser or to the seller for the freight? Or does it depend upon the contingency whether the contract of sale is affirmed or avoided? And if affirmed, and the carrier should deliver the goods without insisting on his lien, of whom must he collect it? The authorities hold, when the agreement of sale is within the Statute of Frauds, that the contract of the carrier is with the consignor. Coombs v. Bristol & Exeter Railway Co., 3 H. & N. 510; Coats v. Chaplin, 3 Q. B. 483.

We do not think the carrier's contract and right to recover his freight can be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation. His contract must arise from the circumstances of his employment. He has a right to look for his compensation to the party who required him to perform the service by causing the goods to be delivered to him for transportation. And that party, unless he is the mere agent of some other, may enforce the contract, and sue for its breach by the carrier.

One who forwards goods in execution of an order or agreement for sale is not a mere agent of the purchaser in so doing. He is acting in his own interest and behalf, and his dealings with the carrier are in his own right and upon his own responsibility, unless he has some special authority or directions from the purchaser, upon which he acts.

The plaintiff in this case is therefore entitled to maintain his action upon the contract; and we think there is no sufficient reason shown to prevent his recovering the full value of the property destroyed. If Clark was the owner at the time, and his interest has been in no way satisfied or discharged, the plaintiff will hold the proceeds recovered in trust for his indemnity. Clark might have prose-

cuted an action of tort in his own name, and recovered the value of his property lost; in which event the damages in Finn's suit would have been nominal, or reduced to whatever amount of actual loss he suffered. But it is not pretended that Clark has ever brought any suit or made any claim upon the defendant, although knowing of the pendency of this suit, and having testified as a witness in the same; and all claim by him is long since barred. It is to be presumed that he acquiesces in the recovery by Finn.

If there were any doubt upon this point, we might order a new trial upon the question of damages only. As there is none, the judgment must be upon the verdict.

Exceptions overruled.[8]

[8] Acc. Carter v. Graves, 9 Yerg. (Tenn.) 446 (1836); I. C. R. Co. v. Schwartz, 13 Ill. App. 490 (1883); Carter v. So. Ry. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354 (1900); Ross v. Chicago, etc., R. Co., 119 Mo. App. 290, 95 S. W. 977 (1906). Contra: Union Pac. R. Co. v. Metcalf, 50 Neb. 452, 69 N. W. 961 (1897); Butler v. Pittsburg, etc., Ry. Co., 18 Ind. App. 656, 46 N. E. 92 (1897); Frankfurt v. Weir, 40 Misc. Rep. 683, 83 N. Y. Supp. 112 (1903). For other cases, see Carriers, 9 Cent. Dig. §§ 262–269, 4 Dec. Dig. §§ 72, 76.

The main question taken up in this case is a disposition of the ? whether consignor or consignee ~~can~~ is the owner of goods delivered to Carrier by the consignor. This decided the one who delivers to the carrier is acting in his own interest & behalf and he may enforce the C & sue for its breach by the carrier.

## CHAPTER V

## RIGHTS OF A HOLDER OF A BILL OF LADING

### THOMPSON v. DOMINY.

(Court of Exchequer, 1845. 14 Mees. & W. 403.)

Assumpsit. The declaration alleged that the defendants were the owners of the ship Julia, the master of which had shipped on board thereof, on account of one Grant, 1,303 barrels of oats, to be carried by the defendants, and safely delivered to Grant or his assigns, he or they paying freight for the same; that the defendants signed a bill of lading to that effect, and delivered the same to Grant, and that Grant, for a certain sum, indorsed the bill of lading to the plaintiffs. And it alleged that although the defendants had delivered part of the said goods to the plaintiffs, yet that they refused to deliver the residue thereof.

The defendants pleaded non assumpserunt, and other pleas, on which nothing now turned.

At the trial, before Coleridge, J., at the last spring assizes at Winchester, it was objected for the defendants, that the plaintiffs ought to be nonsuited, on the ground that no action was maintainable by the mere indorsee of a bill of lading in his own name, the instrument not being negotiable. The learned judge inclined to that opinion, but refused to nonsuit, and, the jury having found a verdict for the plaintiffs, he reserved leave to the defendants to move to enter a nonsuit.

Kinglake, Serjt., having in Easter term last obtained a rule accordingly,

Greenwood now showed cause. * * *

a bill of L. is not negotiable

PARKE, B. I never heard it argued that a contract was transferable, except by the law merchant, and there is nothing to show that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods; it does not transfer the contract. That is the conclusion to be drawn from the judgment of Tindal, C. J., in delivering the opinion of the Court of Error in Sanders v. Vanzeller, 4 Q. B. 297; and Lord Ellenborough appears clearly to have entertained the same view of the question.

ALDERSON, B. I am of the same opinion. This is another instance of the confusion, as Lord Ellenborough in Waring v. Cox, 1 Camp. 369, expresses it, which "has arisen from similitudinous reasoning upon this subject." Because, in Lickbarrow v. Mason, 2 T. R. 71, a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word

"negotiable" was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only.

ROLFE, B., concurred.

Rule absolute.[1]

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## WICHITA SAVINGS BANK v. ATCHISON, T. & S. F. R. CO.

(Supreme Court of Kansas, 1878. 20 Kan. 519.)

HORTON, C. J.[2] * * * On the 4th of September, 1876, Henry Schneider delivered to the railroad company, at Valley Center, a certain lot of wheat which was put into a car to be consigned to his order, or assigns, at St. Louis, Mo. At the time of the delivery of the wheat to the railroad company, the defendant's agent at Valley Center issued and delivered to Schneider two original bills of lading, of the same terms, tenor, and effect, for the wheat, and each of which showed the receipt of 23,000 pounds of wheat, and its consignment to Henry Schneider, or to his order or assigns. There was not more than 23,000 pounds of wheat delivered, covered by the two bills of lading. Schneider procured the issue of two original bills of lading, instead of one, upon his statement that he wished one original bill of lading to file in his office as a memorandum of the transaction. Schneider took the two original bills of lading to Wichita, and on September 5th negotiated one of them to Messrs. Woodman & Son for a valid consideration. On the 6th of September Schneider negotiated the other original bill of lading to the plaintiff, a banking corporation, in the regular course of business, and duly transferred and indorsed the same in writing to the bank. The bank accepted the bill of lading from Schneider, and advanced him in good faith the money sued for upon the bill of lading, and wholly relying upon it for security for the advancement, and without any knowledge that two bills of lading had been issued for the wheat. The wheat was forwarded to St. Louis by the railroad company, and there delivered to the holder of the bill of lading so negotiated to Messrs. Woodman & Son. The defendant was, at the several dates above named, a railway corporation, and engaged in operating a line of railway from the city of Wichita, by and through the town of Valley Center, and by and through the county of Sedgwick, in the state of Kansas, to Kansas City, in the state of Missouri, and in carrying and transporting grain and other commodities for hire to St. Louis, Mo. It was the usage and custom of the railroad company, at its station of Valley Center, to issue but one original bill of lading for any one shipment of grain, which custom was known to

[1] In many states the rule of this case has been changed by statutes making bills of lading negotiable, or providing that a real party in interest may sue, or has been avoided by an application of the doctrine of Lawrence v. Fox, 20 N. Y. 268 (1859). The rule does not prevail in admiralty.

[2] The statement of facts and parts of the opinion are omitted.

plaintiff. The agent of the defendant by whom the bills of lading were issued had authority to receive wheat to be transported by the railroad company over its line to St. Louis, Mo., and to issue bills of lading therefor; but the company had given the agent no authority to issue more than one original bill of lading for any single shipment. Schneider being worthless, and having absconded, the bank lost the principal part of the amount of its advancement, and thereupon brought this action to recover the amount of its loss. Upon an agreed statement of facts, substantially in accordance with the foregoing, the district court rendered judgment for the defendant.

The amount involved in this action is less than $1,000, but the questions in issue are exceedingly important. Our state is a great producer of grain, large amounts of which seek markets outside of its boundaries. The means of its transportation are mainly limited to railroads, and commercial transactions by our grain dealers extend to millions each year. The great mass of these products, when started to Eastern markets, are purchased and paid for through bills of lading. The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to a railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant, or consignee, against the shipment, and attaches his bill of lading to the draft.[3] Upon the faith of the bill of lading, and without further inquiry, the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to repurchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer, with a small capital, may buy and ship extensively; and, while having a capital of a few hundred dollars only, may buy for cash, and ship grain valued at many thousands.

[3] "Under a contract for sale of chattels not specific, the property does not pass to the purchaser, unless there is afterwards an appropriation of the specific chattels to pass under the contract; that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier * * * is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. * * * So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till the acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser." Cotton, L. J., in Mirabita v. Imperial Ottoman Bank, L. R. 3 Ex. 164, 172 (1878).

This mode of transacting business is greatly advantageous both to the shipper and producer. It gives the shipper, who is prudent and posted as to the markets, almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments of produce to the markets.

A mode of business so beneficial to so many classes ought to receive the favoring recognition of the law to aid its continuance; and the later decisions have gone very far to strengthen the quasi negotiability of bills of lading, independent of any statutory authority. Mr. Justice Miller said, in McNeil v. Hill, Woolw. 96, Fed. Cas. No. 8,914: "As civilization has advanced, and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter, and otherwise, which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the somewhat cumbersome and often impossible operations of actual delivery of articles of personal property, is the indorsement, or assignment, of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use and trade, they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. * * * If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict his statement which he has made in the receipt, so as to injure a party who has been misled by it."

The authorities speak of bills of lading passing from successive vendor to vendee, and thus become muniments of title of great value. Where one advances money on a bill of lading, or buys the property therein set forth by taking a transfer of such instrument absolutely, the only evidence which he has of the quantity of goods which he has bought, or advanced money on, may be the statement contained in the bill of lading. Indeed, one of the main uses of bills of lading of grain, at this day, is to afford shippers opportunity to obtain advances upon their shipments. When issued, the parties issuing them have the knowledge that they may and probably will be used with commission merchants, or at some bank, to obtain advances of money. In the most of cases, this result is almost certain to follow. We may say that the bills of lading, covering the shipments in this case, were issued with the expectation that one of the two originals would be hypothecated with some banker, commission merchant, or other party, so universally is this practice recognized and adopted. We make these preliminary remarks, of the character and usage of bills of lading, as they

tend to clearly present the questions in controversy, and make, it seems to us, the solution of them easy.

In accordance with well-settled rules, the plaintiff, knowing the custom of the defendant to issue only one original bill of lading for any one shipment of grain, having made advances on the faith of the bill of lading issued by the agent of the company within the apparent scope of his authority, was entitled to recover of such defendant all damages resulting to him from the issuance of two original bills of lading for the same grain—or perhaps we might better say, for this false bill of lading—as the defendant was bound by the act of its agent, and therefore estopped from denying it had the grain stated in the bill sued on. When the defendant knew to what uses bills of lading could be and usually were employed, it was guilty of negligence in issuing two original bills for the same wheat, in violation of its usual custom. It is true, one was issued, so that Schneider might file it away; but when issued, it should have been marked or designated as a "duplicate," so as to be incapable of being hypothecated to defraud those who dealt in such paper. After the wheat shipped by Schneider had been sold to Messrs. Woodman & Son, by transfer of the bill of lading negotiated to them on September 5th, the other bill of lading, transferred to the plaintiff on September 6th, was as worthless and valueless, as if it had been a false bill. Indeed, it was in this respect then false, for it purported to cover certain wheat which it did not represent. The defendant directly afforded Schneider opportunity to commit a fraud upon the plaintiff by issuing the second bill of lading; and its action in this regard was just as harmful to the plaintiff as if it had issued said bill with the intention to defraud the bank, or as if no wheat had been received by it at all. Both of the bills are admitted to be originals, and the company was certainly guilty of culpable negligence.

In a late English case, Brett, J., stated the doctrine of estoppel as follows: "If in the transaction itself, which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act, by mistake, upon such belief, to his prejudice, the second cannot be heard afterward as against the first to show that the state of facts referred to did not exist." Carr v. London Railway, L. R. 10 C. P. 307. * * *

Considering the custom of the railroad company, the mode of doing business with bills of lading, the bank was guilty of no negligence in advancing the money to Schneider. The company was guilty of culpable negligence, which resulted in the consummation of the fraud. "The representations in the bills were made to any one who in the course of business might think fit to make advances on the faith of them." The bank acted on these representations in good faith. Schneider, who obtained the fruits of this fraud, has fled the state,

and is insolvent. The bank, or the railroad company, must suffer. Who, under all the circumstances, ought to bear the loss? The superior equity is with the bank. It advanced moneys on certain representations which were virtually untrue. In this case, is presented every element to constitute an estoppel in pais, within the doctrine that, where one of two innocent persons must suffer by reason of the fraud or misconduct of a third, he by whose act, omission, or negligence, such third party was enabled to consummate the fraud, ought to bear the loss. Thus the defendant was liable, and the court below committed error in holding otherwise.

We agree with the counsel for the defendant, that a bill of lading is not a negotiable instrument, and with much that is stated in their brief concerning the character of these instruments in general. But most of the decisions referred to by them contain discussions of the negotiability of this class of paper, and are not strictly authority, as the defendant's liability does not depend upon the negotiable character of bills of lading. Probably it would be beneficial to the commercial interests of the state, for the lawmaking power to make these instruments negotiable in all the meaning these words imply; but in the absence of such legislation the defendant ought not to have authority to issue bills of lading for grain, and thus put it in the power of the holder thereof to treat with the public on the representation made in them, and then, when money has been advanced on the faith of such statements, by innocent parties dealing in such paper in the regular course of business, contradict the representations of the paper, and thereby injure the persons who have been misled. The principle of estoppel does and ought in such cases to apply.

The judgment of the district court will be reversed, and the case remanded, with instructions to enter judgment for the plaintiff for the amount stated in the agreed statement of facts, with costs. All the justices concurring.[4]

[4] See, also, Coventry v. Gt. East. Ry. Co., 11 Q. B. D. 776 (1883). In Glyn Mills & Co. v. East & West India Dock Co., 7 App. Cas. 591 (1882), bills of lading were issued in triplicate, each containing the clause, "In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." The shippers indorsed and delivered one of the bills to the plaintiffs as security for an advance, but afterwards obtained the cargo themselves by presenting another unindorsed bill. The dock company was held to be excused for the delivery, because the master to whose duty it had succeeded would have been excused. Lord Blackburn said: "I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only, which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as it is thought convenient. Those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be the holder of a bill already parted with. * * * I think, also, that the only reasonable construction to be put upon the clause

## RATZER v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Minnesota, 1896. 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530.)

CANTY, J.[5] The Morrison Grain & Lumber Company shipped three car loads of oats, two from Britt, and one from Forrest City, Iowa, to New York City. One of these cars was shipped on January 5, and the other two on January 7, 1895. A bill of lading was issued for each car by the initial carrier. In each bill the shipper is named as consignee, with the addition, "Notify John Ratzer;" and the destination named is New York City. The initial carrier transported the cars to Livermore, Iowa, and there delivered them (with proper waybills, showing New York to be the destination) to the defendant, the next connecting carrier, with whom and a subsequent carrier it had through traffic arrangements. The defendant carried the cars on its line towards their destination until they reached Morrison, Iowa, on January 8th or 9th, and there delivered all of the oats (of the value of $1,336) to the shipper, on its demand, without requiring a surrender or cancellation of the bills of lading. The shipper at this point converted the oats to its own use.

Within a day or two after the oats were so delivered at Morrison, the shipper indorsed each of the bills of lading, "Deliver to the order of John Ratzer," and signed them. The shipper also drew drafts on said Ratzer, this plaintiff, in favor of the Bank of Reinbeck, for the amount of the purchase price of the oats, attached the drafts to the bills of lading, and delivered all of the same to the bank, who cashed the drafts in good faith, in the regular course of business, relying on the attached bills of lading. The bills of lading were, in the regular course of business, forwarded by the bank to New York, and presented to Ratzer, a commission merchant there, dealing in grain, who on January 14 and 16, 1895, in the regular course of business, paid the drafts in good faith, relying on the attached bills of lading, which he then and there received. If the three cars of oats had continued to New York, their destination, in the usual course of transpor-

at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this contract if he bona fide, and without notice or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading, designating him—either as being the person named in the bill if it has not been indorsed, or if there be a genuine indorsement as being assign—as the person to whom the goods are to be delivered. In that case, as against the shipowner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I in Watts v. Ognell, Cro. Jac. 192. 'That depends,' says Willes, J., in De Nicholls v. Saunders, L. R. 5 C. P. 594, 'upon a rule of general jurisprudence, not confined to choses in action, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and without notice of any assignment fulfills it to the person with whom he made the contract, he is discharged from his obligation.' The equity of this is obvious."

[5] Parts of the opinion are omitted.

tation, they would have arrived there between January 23d and 30th. The shipper, the Morrison Company, is wholly insolvent. Plaintiff brought this action to recover $804.94, the amount so advanced by him on the faith of the bills of lading. The case was tried by the court below, without a jury. The court found all of the foregoing facts, and thereon ordered judgment for defendant. From the judgment entered thereon, plaintiff appeals, and urges, as a ground for reversal, that the judgment is not sustained by the findings of fact.

We are of the opinion that, on the facts found, the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboards by the aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit, and thereby turn their limited capital sufficiently quickly and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading. The effect of this custom, independent of section 7649, Gen. St. 1894, is to make bills of lading to some extent and for some purposes negotiable, and to give superior rights to innocent transferees for value in the usual course of business. * * *

Respondent contends that the consignee is only obliged to produce the bill of lading, but not to surrender it when receiving the goods; and that as the Morrison Company held the bill of lading when the oats were delivered to it in transit, and it did not negotiate the bill of lading until afterwards, the defendant is not liable for so delivering the oats without requiring a surrender of the bill of lading. Whether or not the carrier can compel a surrender of the bill of lading when it delivers the goods it is not necessary here to decide.[6] If the holder of the bill of lading insists on retaining it as a muniment of title, or for any other purpose, and has a legal right to do so, he can, at least, be required to produce it for cancellation, so that it will cease to be

[6] See Dwyer v. Gulf, etc., Ry. Co., 69 Tex. 707, 7 S. W. 504 (1888).

on its face a live bill of lading. And, in our opinion, it was the duty of the defendant at least to require this. It is immaterial that these bills of lading were negotiated to the bank and plaintiff after the oats were so delivered to the shipper. The bills were so negotiated before they had become stale, and even a considerable length of time before the oats would, in the ordinary course of transportation, have arrived at New York, their destination. The defendant permitted these bills to remain outstanding, with all the appearances of live, valid bills of lading. There was nothing to put any one dealing with the Morrison Company on his guard. * * *

It was the duty of the defendant to see that the bills of lading were canceled when it redelivered the oats to the shipper, and its failure to perform that duty enabled the shipper to perpetrate a fraud on the bank and plaintiff. It is a case, for the application of the doctrine of equitable estoppel, that, where one of two innocent persons must suffer by reason of the fraud of a third party, he by whose negligent act or omission such third party was enabled to commit the fraud ought to bear the loss. Under this rule, the defendant is estopped from showing that it delivered the goods to the shipper at the intermediate point, and is liable to plaintiff for failure to deliver them to him at the place of original destination. This disposes of the case.

The judgment is reversed, and judgment ordered for plaintiff, pursuant to this opinion.[1]

[1] Acc. Union Pac. Ry. Co. v. Johnson, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540 (1895). See Midland Nat. Bk. v. Mo. Pac. Ry. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505 (1895); also Pollard v. Reardon, 65 Fed. 848, 852, 13 C. C. A. 171 (1895), sale of goods in transit by one whom prior purchaser had permitted to retain bill of lading; Am. Zinc Co. v. Markle Lead Works, 102 Mo. App. 158, 76 S. W. 668 (1903), sale by one whom owner had permitted to take out bill of lading. Compare Merchants' Nat. Bk. v. Baltimore, etc., Co., 102 Md. 573, 63 Atl. 108 (1906), spent bill negotiated by fraudulent alteration.

As to the liability to a later indorsee of a carrier who fails to take up the bill of lading on delivery at destination, see Alabama Nat. Bk. v. Mobile & O. Ry. Co., 42 Mo. App. 284 (1890); Mairs v. Balt. & O. R. Co., 73 App. Div. 265, 76 N. Y. Supp. 838 (1902); Greenwood Grocery Co. v. Canadian El. Co., 72 S. C. 450, 454, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627 (1905); Hardie v. Vicksburg, etc., Co., 118 La. 253, 42 South. 793 (1907), statutory. See also, Nebraska Meal Mills v. St. Louis S. W. Ry. Co., ante, p. 155.

In Chesapeake S. S. Co. v. Merchants' Nat. Bk., 102 Md. 589, 63 Atl. 113 (1906), bills of lading to shipper's order having the words "Not negotiable" printed on their face, provided: "The surrender of the bills of lading properly indorsed shall be required before the delivery of the property at destination." Page, J., said: "We have held in the preceding case that the obligation of the appellant to require the surrender of the bill of lading when the goods are delivered was a provision intended for the protection of all who dealt with the goods. To deliver the goods without such surrender was therefore the equivalent of a declaration that the goods were still in the carrier's possession. If, therefore, it had in fact parted with the possession without such requirement, there was a breach of its duty to a party who had a right to rely, and did rely, upon the implied assurance; and such party can bring a suit in his own name to recover damages. This question does not depend upon the negotiability of the bill, nor upon whether the party injured may bring an action ex contractu for his damages."

## ELLIS v. WILLARD.

(Court of Appeals of New York, 1854. 9 N. Y. 529.)

* * * This was an action to recover a balance due for the freight of certain goods transported by the plaintiff for the defendant upon the Chenango Canal, for which bills of lading had been given, in the usual form, acknowledging that the property had been shipped in good order, and agreeing to deliver the same, in like good order, at the places of destination. A portion of the merchandise for which freight was claimed consisted of dry hides, which were shipped at Buffalo, to be transported to Utica. The referee found that a part of the hides were wet and in bad order when delivered at Utica, and that they were in like bad order when received by the plaintiff, at Buffalo. * * * The referee reported a judgment in favor of the plaintiff for $6,297, the whole balance due for freight, according to the contract price; and, the judgment entered on his report having been affirmed at General Term, the defendant took this appeal.

ALLEN, J.[8] The bills of lading signed by the plaintiff were in the usual form, acknowledging that the property was shipped in good order, and agreeing to deliver the same at the places of destination in like good order. It is claimed by the defendant that by it the plaintiff is estopped from showing the true condition of the property at the time of shipment, and the principal exception in the case is to the decision of the referee admitting evidence upon that point, and in giving effect to it in his final report, and exonerating the plaintiff from liability upon proof that the hides were in a damaged condition, when shipped.

The statement of the condition of the property in the bill of lading constitutes no part of the contract of affreightment, and the relation of the parties and the nature of the contract will not allow us to call it a contract of warranty. If it was a part of the agreement between the parties, as is claimed by the defendant, then the referee erred in the admission of parol evidence to vary it. But, like the statement in respect to the quantity and amount of the property, it is but a declaration—an admission by the party signing it—and is no more conclusive than any other acknowledgment or admission. It is prima facie evidence of the fact stated, and casts the burden of proving it otherwise upon the party making it. An admission or declaration is never conclusive, whether made in writing or verbally, as a mere admission or declaration not acted upon. It may become so, or rather the party may be estopped from contradicting it, as against one who has acted upon the faith of it, and has parted with property relying upon the truth of the statement. A shipowner may be estopped from alleging a deficiency in the property shipped, as against a consignee who has advanced money upon the credit of the bill of lading. But

[8] Parts of the statement of facts and opinions are omitted.

receipts and admissions, as such, are always open, as between the parties, to explanation, and are impeachable for any mistake, error, or false statement contained in them; in a word, they may always be contradicted, varied, or explained by parol testimony. 1 Phil. Ev. 107; 1 Cow. & Hill's Notes, 213, note 194; 3 Stark. Ev. 1271; Tobey v. Barber, 5 Johns. 68, 4 Am. Dec. 326. A bill of lading is not an exception to the rule; and that part of the bill which relates to the receipt of the goods, their quality, condition, and quantity, is treated as a receipt, as distinct from the contract. Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45; Graves v. Harwood, 9 Barb. 477; Dickerson v. Seelye, 12 Barb. 99; Price v. Powell, 3 N. Y. 322; Maryland Insurance Co. v. Ruden's Adm'r, 6 Cranch, 338; Berkley v. Watling, 7 Ad. & E. 29. The contract, so far as it is evidenced by the bill of lading, is not liable to be thus affected by parol evidence. Creery v. Holly, 14 Wend. 26.

There is no reason, and no direct authority, for holding that a bill of lading can be contradicted as to the condition of the goods, when they are not, at the time of shipment, in a situation to be inspected, and that a different rule prevails when the goods may be seen and handled by the shipowner. If it is a part of the contract, then, in no case, in the absence of fraud, can it be varied by parol; if it is a receipt, then it is subject to all the rules by which that class of instruments are governed. The contract is merely to deliver in the like good order as received, and when the condition is ascertained, either by the admission in the bill of lading, or proof aliunde, the duty of the party is fixed. * * *

DENIO, J. * * * The substance of the carrier's contract was to transport and deliver the property at its destination, without causing or permitting any damage to be done to it. Parol evidence could not be allowed to change the effect of this undertaking. Creery v. Holly, 14 Wend. 26. The other part of the bill is only the acknowledgment of a fact, which, though strong evidence against him, may be overcome by satisfactory proof that it was erroneous. * * *

Judgment affirmed.[*]

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## NATIONAL BANK OF COMMERCE v. CHICAGO, B. & N. R. CO.

(Supreme Court of Minnesota, 1890. 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.)

An elevator company which had contracted to sell wheat to Mouk & Co. loaded the wheat on cars of the defendant railroad company, which were standing on a spur track beside their elevator, sent Mouk

[*] As to the interpretation and effect of a stipulation in a bill of lading that its recitals shall be conclusive, see Sawyer v. Cleveland Iron Min. Co., 69 Fed. 211, 16 C. C. A. 191 (1895); Mediterranean, etc., Co. v. Mackay, [1903] 1 K. B. 297.

& Co. a bill for the wheat, and received from Mouk & Co. a check for the price. Mouk & Co. obtained, from the agent of defendant railroad, bills of lading naming them as consignors and persons in Illinois and Wisconsin as consignees. They drew drafts on the consignees and sold them to the plaintiff bank with the bills of lading attached. Next day Mouk & Co.'s check was dishonored, and the elevator company took the wheat from the cars and put it back into the elevator. The drafts were not paid when due, and the bank brought this action for the value of the wheat. It was tried together with other suits arising from the same set of transactions. The trial court found that the wheat had been delivered to the railroad company, and had become the property of Mouk & Co., and that the railroad was liable to the bank for failure to deliver it. The Supreme Court held that the act of the elevator company in putting the wheat on the cars was not, on the evidence, a delivery to the railroad, and did not put the wheat into the railroad's possession; that, if the elevator company did deliver to Mouk & Co. by accepting their check, the delivery was only conditional on payment of the check; and that when the check was dishonored it had a right to resume possession.

MITCHELL, J. (after stating the foregoing matters of fact and law).[10] It only remains to consider, in the bank cases, the effect of the bills of lading upon the liability of the railway companies to the bank, in case no wheat was in fact ever delivered to them for transportation. Of course, if the wheat was delivered by the elevator company to Mouk & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable, for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently, or through mistake or negligence, issues a false bill of lading, which passes into the hands of a bona fide consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading issued by his agent, from showing that no goods were in fact received for transportation. Grant v. Norway (1851) 10 C. B. 665; Coleman v. Riches (1855) 16 C. B. 104; Hubbersty v. Ward (1853) 8 Ex. 330; Brown v. Coal Co. (1875) L. R. 10 C. P. 562; Mc-

[10] The statement of facts has been rewritten, and parts of the opinion omitted.

Lean & Hope v. Fleming (1871) L. R. 2 H. L. Sc. 128; Cox, Patterson & Co. v. Bruce & Co. (1886) 18 Q. B. D. 147; Meyer v. Dresser (1864) 16 C. B. (N. S.) 646; Jessel v. Bath (1867) L. R. 2 Ex. 267. And this has not been at all changed by the "bills of lading act" (18 & 19 Vict. c. 111, § 3). It is also the settled doctrine of the federal courts. The Freeman v. Buckingham (1855) 18 How. 182, 15 L. Ed. 341; The Lady Franklin (1868) 8 Wall. 325, 19 L. Ed. 455; Pollard v. Vinton (1881) 105 U. S. 7, 26 L. Ed. 998; Railway Co. v. Knight (1887) 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Friedlander v. R. Co. (1889) 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. * * *

The case of The Lady Franklin did not involve the question of a bona fide purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But, in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and apparently Ohio. Sears v. Wingate (1861) 3 Allen, 103; Railway Co. v. Wilkens (1876) 44 Md. 11, 22 Am. Rep. 26; Fellows v. The Powell (1861) 16 La. Ann. 316, 79 Am. Dec. 581; Hunt v. Railway Co. (1877) 29 La. Ann. 446; Bank v. Laveille (1873) 52 Mo. 380; Williams v. Railway Co., 93 N. C. 42, 53 Am. Rep. 450; Dean v. King, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side. See 38 Am. Dec. 410 (note to Chandler v. Sprague).

The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance

of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.

An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. Armour v. Railway Co., 65 N. Y. 111, 22 Am. Rep. 603; Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Sioux City, etc., R. Co. v. First Nat. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; Railroad Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235. The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel in pais; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. 315, 318, 1 L. R. A. 143, 12 Am. St. Rep. 636.

It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was res integra we confess that it seems to us that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted

her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted.

Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.[11]

In each of the first two cases the judgment, and in each of the last two, the order, appealed from is reversed, and in each of the four cases a new trial is directed.

Ordered accordingly.[12]

On reargument.

MITCHELL, J. The plaintiff in these actions asks for a reargument on the ground that counsel and the court overlooked section 17, c. 124, Gen. St. 1878, which provides that bills of lading or receipts for any goods, wares, merchandise, etc., when in transit by cars or ves-

[11] Acc. Smith v. Mo. Pac. Ry. Co., 74 Mo. App. 48 (1895). And see Walters v. Western, etc., Co. (C. C.) 56 Fed. 369 (1893). But see Mo. Pac. Ry. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944 (1894); Swedish-Am. Nat. Bk. v. C., B. & Q. Ry. Co., 96 Minn. 436, 105 N. W. 69 (1905).

[12] Acc. Lazard v. Merchants', etc., Co., 78 Md. 1, 26 Atl. 897 (1893); Roy v. No. Pac. Ry. Co., 42 Wash. 572, 85 P. 53, 6 L. R. A. (N. S.) 302 (1906); Henderson v. Louisville, etc., R. Co., 116 La. 1047, 41 South. 252, 114 Am. St. Rep. 582 (1906).

sels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified," etc. This statute was not called to our attention upon the argument, but an examination of it upon this motion satisfies us that it has no bearing upon the questions involved in these cases. It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself. See Shaw v. Railroad Co., 101 U. S. 557, 25 L. Ed. 892.

We cannot see that section 471 of the Penal Code, cited in the petition for reargument, has any bearing whatever on the cases. The petition for reargument is therefore denied.

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## TIBBITS v. ROCK ISLAND & P. RY. CO.

(Appellate Court of Illinois, Second District, 1893. 49 Ill. App. 567.)

CARTWRIGHT, C. J.[18] Tyng, Hall & Co., of Peoria, Ill., delivered to appellee at that place a quantity of corn for shipment to Custer City, Pa., and received from appellee a bill of lading for the same. The grain was shipped to the order of Tyng, Hall & Co. at Custer City, with directions to notify appellants. The bill of lading contained a column for the weight of the corn, at the top of which was the word "Weight" and under that were the words "Subject to corrections." In this column the weight of the corn was set down at 38,600 pounds. The grain was loaded into a car from the Central City Elevator at Peoria, and the weight was furnished by the weighmaster of the Board of Trade, whose weights were universally accepted by parties dealing in grain and by the railroad company. Tyng, Hall & Co. filled up a blank form of a bill of lading furnished them by appellee, inserting the weight so given, and the agent of appellee signed it. The car was sealed and forwarded to Custer City. Tyng, Hall & Co. drew a draft on appellants in favor of Peoria National Bank against the shipment, for $246.18, which appellants paid and received the bill of lading. The car was received at Custer City in good order, with the seals unbroken, showing that no grain had been lost in transit. Appellants paid the freight on the amount of corn stated in the bill of

[18] Part of the opinion is omitted.

lading, but the corn in the car, when opened, only weighed 24,264 pounds, a shortage of 14,336 pounds. Appellants brought this suit before a justice of the peace to recover for such shortage, and obtained judgment. On appeal to the circuit court, the case was tried by the court without a jury. The foregoing facts appeared, and there was a finding and judgment for appellee.

The court held, in propositions of law submitted for the purpose, that as to the quantity of any article of shipment received a bill of lading issued by a carrier is to be treated as a receipt, and subject to explanation in that respect; that the carrier may make such explanation against an assignee for value whenever the bill of lading, taken as a whole, shows that the carrier does not vouch for the correctness of the written statement of the quantity received; and, that in view of the language used in the printed portion of the bill of lading in question, which stated that the weight was subject to correction, and that the contents were unknown, it was competent for the defendant to show the quantity of corn received for shipment, and it was not liable for more than was actually received.

Bills of lading are constantly used by shippers to obtain advances upon their shipments, and it is to be expected by the carrier that such use will be made of them, and that advances will be made upon the faith that the property described in them is in the possession of the carrier, and will be delivered to the holder of the bills of lading. Those trusting in them, and relying upon their truth, do only what the carrier has every reason to expect will be done. Such use is a material aid to traffic and business, and is to be recognized as an important and useful factor in the stock and grain business of the country. Appellants paid the draft in this instance, relying upon the representations of appellee made in the bill of lading, and they paid the freight charges exacted from them on the 38,600 pounds named in the bill, before they had any means of knowing that less than two-thirds of that amount was in the car. Appellants having advanced money on the faith of the bill of lading, it would be a fraud upon them to permit appellee to escape liability by showing that its statements therein contained were false. St. L. & I. M. R. R. Co. v. Larned, 103 Ill. 293. So far as appellants are concerned, appellee must be bound by the terms of its contract.[14]

The bill of lading used was a general blank form for shipping all sorts of freight, and contained in parenthesis the words "Contents and value unknown," evidently intended to apply to packages therein

[14] Acc. Relyea v. New Haven Mill Co., 42 Conn. 579, 75 Fed. 420 (U. S. D. C., 1873). See, also, note to Chandler v. Sprague, 38 Am. Dec. 410, 414.

But see Lake Shore, etc., Ry. Co. v. Nat. Bk., 178 Ill. 506, 518-524, 53 N. E. 326 (1899). In this case Phillips, J., said: "A bill of lading is both a receipt and a contract, and the receipt of the goods for carriage is the basis of the contract of carriage. If no goods are received for carriage, there can be nothing on which the contract of carriage can be based, as the duties and obligations of the carrier with respect to the goods must commence with their delivery

mentioned, the contents of which were concealed from view. It could not apply to corn in bulk loaded into a car from an elevator. Appellee did not intend to say by its bill of lading that it had received 38,600 pounds of corn, the contents of which were unknown, and it would not be so understood.

So far as the provision that weight was subject to correction is concerned, a reasonable interpretation must be given to it, such as both parties would naturally give when the shipment was made. Errors and mistakes are liable to occur in weighing grain as in other things, and the right to correct such errors was reserved in the contract. Appellants had notice of that provision, and anything attributable to such ordinary errors and differences in weighing as might be reasonably expected to occur, might be corrected, but the right must be kept within the reasonable limits of such errors. Appellants, when advancing money on appellee's statement that it had 38,600 pounds of corn, to which they would get title by acquiring the bill of lading, would certainly not anticipate, under the provision for correcting errors in weighing, such an unreasonable difference in weight, not attributable to ordinary errors of that sort, as would amount to 256 bushels in a car load of corn. Such a difference would be apparent to sight, and it would require no test of weighing to show that it existed. Appellee would have no right, under cover of correction of errors in weighing, to account for such a difference as could arise only from gross negligence of its agent. Such obvious difference could not be charged to errors not plainly apparent, and merely due to mistakes in weighing, which would be discovered on again weighing the corn. If appellee could reduce the amount of corn more than one third, there would be no limit to the correcting that might be done.[15]

In our opinion, the holding of the court that appellee could not be made liable for more than the amount of corn delivered, was erroneous. * * * The judgment will be reversed and the cause remanded.

to him in a manner that puts upon him the exclusive duty of seeing to their safety."

In Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998 (1881), Miller, J., said: "The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

[15] Compare Miller v. Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179 (1882), barrels containing only sawdust shipped as "30 bbls. of eggs, contents unknown"; The Querini Stamphalia (C. C.) 19 Fed. 123 (1883), weight unknown; Alabama Gt. So. R. Co. v. Comm. Mfg. Co., 146 Ala. 388, 42 South. 406 (1906), "50 bales, weighing 25,000 lbs., contents unknown," where the bales numbered 50, but weighed only 14,000 pounds.

## MADDOCK v. AMERICAN SUGAR REFINING CO.

(District Court, D. Massachusetts, 1898. 91 Fed. 166.)

LOWELL, District Judge. The libelant, who is the owner of the steamship Salamanca, seeks to recover the balance of freight due for the carriage of sugar on the steamship from Cuba to Boston. The respondent was the purchaser of the sugar, and seeks to offset against the unpaid balance the value of 37 bags of sugar. The bills of lading, signed by the master of the Salamanca and assigned to the respondent, acknowledge the receipt on board the Salamanca of 11,640 bags, and the respondent paid value for this number of bags to the shipper; whereas the respondent contends that only 11,603 bags were delivered to it in Boston. It is admitted, however, that all the bags received on board, whatever the number, were duly delivered. As the case is presented, I have to determine if the vessel is liable for the shortage in the number of bags of sugar set out in the bill of lading, when the bill of lading and the sugar represented by it have passed to a bona fide purchaser. No fraud is charged against any one—master, owner, shipper, or vendee.

The great weight of authority, both in England and in this country, seems to hold that the vessel is not liable in the case above stated. See The Freeman, 18 How. 182, 15 L. Ed. 341; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Railway Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Jessel v. Bath, L. R. 2 Exch. 267; Sears v. Wingate, 3 Allen (Mass.) 103; The Loon, 7 Blatchf. 244, Fed. Cas. No. 8,499; Robinson v. Railroad Co. (C. C.) 9 Fed. 129; 1 Pars. Shipp. & Adm. 187; McLachlan, Shipp. 394; Legg. Bills Lad. 62. Several cases in New York to the contrary effect are admittedly opposed to cases which the Supreme Court has cited with entire approval. It is contended, indeed, that though the vessel be not liable for a shortage in weight, upon the ground that it is difficult, if not impossible, to weigh a cargo exactly, yet that the vessel is liable for a shortage in the number of cases or packages or other separate articles, inasmuch as these may be definitely counted. Without discussing if the exact number of more than 10,000 bags of sugar can be ascertained more accurately than the weight of a cargo of coal, I find nothing in the authorities to support the distinction urged.

The decisions above quoted, and many others, are made to rest upon the principle that the master's apparent authority to bind the vessel and its owner does not extend to signing bills of lading for cargo not actually received on board, or, at any rate, delivered into his hands for shipment. I must confess that this reasoning seems to me not altogether satisfactory. I suppose that the statement of the bill of lading signed by the master is evidence of the receipt of the goods mentioned in it, even against the owner and the vessel. See McLean v. Fleming, L. R. 2 H. L. Sc. 128, 130; Legg. Bills Lad. 225;

Pars. Shipp. & Adm. 197. It is hard to see how this can be so, if the master's authority extends only to goods actually received. If his authority be so limited, his receipt of the goods must first be proved, in order to show that he is authorized to certify that they have been received. Perhaps a better reason for the established doctrine may be that a bill of lading is not generally understood to be a representation to whomsoever it may concern that certain articles are in the hands of the carrier, but merely a receipt, which is, indeed, prima facie evidence of the facts set out in it, but is also subject to contradiction as against even a bona fide holder thereof. Whatever be the grounds of the doctrine, however, I think it is established too firmly for this court to question it.

Decree in accordance with this opinion.[16]

[16] Affirmed 93 Fed. 980, 36 C. C. A. 42 (1899) Acc. Brown v. Powell Coal Co., L. R. 10 C. P. 562 (1875). "* * * It is a mistake to suppose that the interests of commerce require that the common carriers of the country shall become the insurers or guarantors of merchants who choose to make, in their dealings with others, a convenience of their bills of lading." Hammond, J., in Robinson v. Memphis, etc., R. Co., 9 Fed. 129, 140 (1881).

"To hold the ship to such a liability, would be not only in plain contradiction of the authorities above cited, but a plain enlargement and perversion of the ship's business from that of simple transportation, to that of guarantor and insurer against fraud or mistake in the execution of contracts between vendor and vendee for their convenience. That is not the proper business of the ship, or of her officers. The vendor and vendee could not make the ship or her owners responsible for the exact performance of the contract between themselves by means of the ship's tally taken for the purpose merely of giving the receipt in the bills of lading. The shipper plainly could base no conclusive claim upon such a tally; nor can the consignee, because neither the tally nor the bills of lading were given for the purpose of authorizing payment by the consignee before delivery or without any verification of the ship's count; nor was the consignee authorized to make use of the tally for such a purpose, except at his own risk, as regards fraud or mistake. There has long been, no doubt, a recognized tendency in favor of commercial dealings in goods in transit, to which dealings the ship is no party, to make the ship responsible, by the application of the principle of equitable estoppel, for the accuracy of the receipt stated in the bill of lading. This has never been by any acquiescence or agreement on the part of the carrier. In self-defense and to protect themselves against liabilities which they never intended to assume and for which they have received no corresponding remuneration, masters and ship owners have long been in the habit of inserting various restrictions and exceptions in order to guard against such responsibility." Brown, J., in the Asphodel (D. C.) 53 Fed. 835 (1893).

Where a bill of lading recites that freight has been paid, the carrier is estopped to contradict the recital as against one who has bought in reliance upon it. Howard v. Tucker, 1 B. & Ad. 712 (1831).

# CHAPTER VI

# TICKETS

## 'AUERBACH v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1882. 89 N. Y. 281, 42 Am. Rep. 290.)

EARL, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger He was nonsuited at the trial, and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows:

The plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached"; that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that, if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and stayed there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day.

Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows: "Issued by Ohio and Mississippi Railway on account of New York Central and Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched

several times, until the plaintiff reached Hudson about 3 or 4 o'clock a. m., September 27th, when the conductor in charge of the train declined to recognize the ticket on the ground that the time had run out, and demanded $3 fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. Hutchinson on Carriers, § 579; Brooke v. Grand Trunk Railway Co., 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road; that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train, and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.[1]

[1] Compare Gt. No. Ry. Co. v. Winder, [1892] 2 Q. B. 595, where a passenger using a ticket for a distant station to a nearer point to which the fare was higher was held liable for the difference in fares.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September, and presented his ticket, and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned, it had then performed its office. It was thereafter left with him not for his convenience, but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.[2]

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.[3]

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## MORNINGSTAR v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama, 1902. 135 Ala. 251, 33 South. 156.)

SHARPE, J.[4] Apart from the office it may perform in evidencing the contract of carriage, the chief use of a passenger ticket is to identify the holder as a person who has paid his fare, or has otherwise complied with conditions entitling him to carriage, and this use of it is or-

[2] "Suppose the Post Office Department were to determine to retire all postage stamps of a certain print, and should notify the public that such stamps could not be used after a certain day. Would any person doubt that a letter mailed with such a stamp at any time before the closing of the mails on the day named would go to its destination, although the transit might take a week or more?' Thompson, J., in Evans v. St. Louis, etc., Ry. Co., 11 Mo. App. 463 (1882).

[3] A ticket unlimited as to time is good until the time fixed by the statute of limitations for bringing actions of simple contract has elapsed since its issue. See Erie R. Co. v. Littell, 128 Fed. 546, 63 C. C. A. 44 (1904). But is not good thereafter. Cassiano v. Galveston, etc., Ry. Co. (Tex. Civ. App.) 82 S. W. 806 (1904). In Keeley v. B. & M. R. Co., 67 Me. 163, 24 Am. Rep. 19 (1878), it was held that a ticket bought in Portland, bearing the words "Portland to Boston," did not entitle the holder to passage from Boston to Portland.

[4] The statement of facts has been omitted.

dinarily made when the holder offers himself to be carried; hence, where nothing is expressed to the contrary, a stipulation purporting to limit the use of a ticket to a specified time is construed as fixing that time as the latest for commencing, and not for completing, the journey. Auerbach v. Railroad Co., 89 N. Y. 281, 42 Am. Rep. 290; Lundy v. Railroad Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100.

Accordingly the clause in plaintiff's ticket declaring it "void after May 20, 1900," implied a stipulation merely for plaintiff's commencement of the trip from Pensacola before the expiration of that day. He had a right to assume, and to rely upon the assumption, that defendant would conform to its schedule for running trains, and was prevented from entering upon his journey on May 20th only by delay until after midnight of the train scheduled to leave Pensacola at the hour of 11:20 p. m. of that day. Defendant was not entitled to treat its own default as defeating its obligation to the plaintiff, nor was that obligation discharged by placing him at Flomaton.

Defendant operated the road from Flomaton to Mobile, as well as that from Pensacola to Flomaton, and, having accepted his ticket for passage to the latter place, and having delayed his arrival there until the usually connecting train had gone, it was under the duty to not abandon him, and to afford him opportunity to proceed by another train to Mobile. If, as the evidence tends to show, the plaintiff was duly diligent about attempting to pursue his journey from Flomaton, the conductor of the Mobile train in ejecting him acted not under, but in violation of, the contract of carriage. The ticket did not purport to show on its face, or in connection with the fact that plaintiff was journeying late, that any forfeiture had occurred under the time limitation, for the circumstances controlling his right to so travel were not disclosed by the ticket. The conductor, in denying that right, simply risked the company's responsibility upon the existence vel non of facts avoiding such forfeiture. The evidence offered by plaintiff tended to the establishment of such facts, and should not, as a whole, have been excluded from the jury.

Reversed and remanded.[8]

[8] A passenger who had begun his journey in due season stopped over by consent of the railroad, and attempted to resume his trip after the time to which his ticket was limited had expired. The ticket was held to be invalid. Landers v. Mo., etc., Co. (Tex. Civ. App.) 50 S. W. 528 (1899).

A passenger who began a journey at 9 p. m., upon a ticket to expire at midnight, was obliged in its usual course to change after midnight to a train on another division of the same road. It was held that his ticket entitled him to passage on that train. Cleveland, etc., Ry. Co. v. Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245 (1901).

A passenger bought a ticket over connecting lines and immediately began his journey. Because of a wreck, he could not reach the last carrier's line until after the time to which his ticket was limited had expired. It was held that, if the last carrier had contracted only for carriage over his own line, the ticket had become invalid. It was also held that if he had contracted for through transportation the ticket was still good. Gulf, etc., R. Co. v.

## GARRISON v. UNITED RYS. & ELECTRIC CO.

(Supreme Court of Maryland, 1903. 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452.)

McSHERRY, C. J.[6] * * * It appears that the appellant, with two friends, boarded a car of the appellee at the corner of Lombard and Carey streets, in Baltimore, about 3:40 or 3:45 on the afternoon of March 6, 1901. They paid their fares, and asked for transfers to the Wilkins Avenue line going south. The conductor gave the transfers as requested, and punched the date, the hour, 3:50, and the transfer point, Gilmor and Lombard streets. The transfers were limited as to the time within which they could be used, and the time thus limited was indicated by the punch marks which the conductor made. It is alleged by the appellant—and for the purposes of this discussion it will be assumed to be true—that no car passed south on Wilkins avenue until after the time limited for the use of the transfer had expired. * * *

In the nature of the case, regard being had to the character and the magnitude of the business of conveying on street cars hundreds of thousands of passengers, it would seem to be a very proper precaution for the company to protect itself against imposition by affixing to the transfers which it is required to issue a limit beyond which they should not be available for use. When thus limited, they are void, and do not entitle the holder to ride on the cars after the expiration of the time specified by the punch marks. The statute makes the transfers good for a continuous ride. That language would seem to exclude the notion that there can be no time limit affixed. A continuous ride does not mean a ride interrupted by a considerable interval of time. If the time within which the transfer may be used expires by reason of the failure of the company to run its cars frequently enough, that fact does not make the transfer good, or authorize a conductor to honor it. In such circumstances it is the plain duty of the passenger to pay his fare.

But he is not without remedy. If, by the company's fault, the transfer expires before the holder has had an opportunity to use it, and in consequence he is required to pay and does pay his fare, he

Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787 (1892). But see, as to the latter point, Pa. Co. v. Hine, 41 Ohio St. 276 (1884).

Where the last day for using a ticket fell on Sunday, and no trains ran that day, the ticket was held good on the first train on Monday. Little Rock, etc., Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584 (1884).

Where a strike prevented the running of trains until after a ticket had expired, it was held that the holder of the ticket, who had made his intended journey by another railroad, could not use the ticket at his next opportunity after the strike was over. Elliott v. So. Pac. Co., 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393 (1904).

[6] Parts of the opinion are omitted.

would have his action against the company. But if it were held that, in spite of the expiration of the transfer, the conductor was still obliged to accept it, the company would be exposed to flagrant imposition without any means of protecting itself. The transfer, like a railroad company's ticket, is the evidence of the passenger's right to ride. U. Rys. & E. Co. v. Hardesty, 94 Md. 661, 51 Atl. 406, 57 L. R. A. 275; W. M. R. R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880; B. & O. R. R. Co. v. Blocher, 27 Md. 277. If the transfer, like the ticket, is void on its face, it is not a token of the holder's right to be transported on the carrier's conveyance. In P. W. & B. R. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97, the liability of the company was placed upon the ground that the ticket was apparently good on its face. This is distinctly pointed out in W. M. R. R. Co. v. Stocksdale, supra.

In the case at bar the transfer was void on its face when the appellant attempted to use it. It therefore did not entitle him to ride on the Wilkins Avenue car, and the conductor was justified in demanding the appellant's fare, and, upon the refusal of the latter to pay, the conductor was warranted in ejecting him. There was, consequently, no error committed in rejecting the appellant's first prayer and in granting the appellee's second prayer. * * *

Judgment for defendant affirmed.

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## AIKEN v. SOUTHERN RY. CO.

**(Supreme Court of Georgia, 1903. 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.)**

Aiken, as administrator of King, sued the defendant railway company, alleging that by selling King tickets for himself and wife it contracted with King for the safe carriage of his wife as a passenger, but by negligently jerking the train as she was about to alight caused her serious injuries, and thereby subjected her husband to expense and to the loss of his wife's services. A demurrer to the petition was sustained, and plaintiff excepted.

COBB, J.[1] * * * When the petition in the present case is construed as a whole, we think it sufficiently appears that the purpose of the pleader was to bring an action on the alleged contract of carriage. So construing it, it is to be determined whether it sets forth a cause of action. Does it sufficiently appear that the railway company entered into a contract with King for the safe transportation of his wife? It is alleged in terms that King contracted with the railway company, but the manner in which the contract was made is also set forth, and from this it is apparent that King made no other contract than one

[1] The statement has been written from facts stated in the opinion. Parts of the opinion have been omitted.

which would arise from the mere purchase of an ordinary ticket for his wife.

The question, therefore, arises whether, when one purchases such a ticket from a railway company for the use of another, and there are no other transactions or negotiations between the purchaser and the company, the contract of carriage is made with the purchaser of the ticket, or with the one who uses the ticket as evidence of a right to passage. While there has been some difference of opinion as to whether a railroad ticket constitutes a contract, by the great weight of authority "the ordinary ticket is not a contract, but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and is intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract." 6 Cyc. 570. See, also, 25 Am. & Eng. Enc. L. (1st Ed.) 1074; 1 Fetter, Carriers, § 275; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; McLain's Cas. Car. 57, 222, 663, 682.

In Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146, this language was used: "A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system." See, also, Southern Railway Company v. Watson, 110 Ga. 691, 36 S. E. 209.

There is nothing alleged in the petition as to the character of the ticket purchased by King for his wife, and it is to be presumed that it was the ordinary ticket indicating the points between which the passenger was to be transported. When one purchases an ordinary ticket from the ticket agent of a railway company, and there is no other communication between the purchaser and the company than the application to the ticket agent for the ticket, the delivery of the ticket, and the payment of the price, the railway company, by the delivery of the ticket under such circumstances, undertakes to safely transport and carry any person who may enter its cars as a passenger having possession of such ticket. In the absence of some express agreement to the contrary, this is the undertaking of the company. If the purchaser himself becomes the passenger, he has a right to rely upon the implied contract of safe transportation. On the other hand, if he does not become the passenger, but delivers the ticket to some one else, either for a valuable consideration or gratuitously, the implied obligation on the part of the railway company to safely transport arises in favor of him who presents himself as a passenger and tenders the ticket as evidence of his right to passage. In other words, in such a case the contract entered into by the railway company at the time the

ticket is delivered is simply a contract safely to transport whoever may present himself as a passenger holding the ticket.

We do not mean to hold that a husband might not make an express contract with a railway company for the safe transportation of his wife; but it would seem that, where such a contract was claimed, it would be incumbent upon the person setting it up to show that the agent with whom it was made had authority to do so. What we do mean to hold is that the mere purchase of an ordinary ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the purchaser and the company for the safe transportation of the wife, but the implied contract for safe passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone can an action be maintained for its breach. Of course, we do not mean to hold that where a railroad company has undertaken to safely carry a wife, or child, or servant, the husband, or father, or master may not, in an action of tort, recover any damages he sustains on account of injuries received by the wife, child, or servant in consequence of the negligence of the carrier. * * *

Judgment affirmed.

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## SLEEPER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1882. 100 Pa. 259, 45 Am. Dec. 380.)

Case, by George W. Sleeper against the Pennsylvania Railroad Company, to recover damages for an illegal ejecting of plaintiff from defendant's train.

On the trial the plaintiff testified that on the morning of May 8, 1878, he took passage on the defendant's train from New York to Philadelphia and tendered to the conductor in payment of his fare a ticket which he had bought several months before at a place on Broadway, New York, not a regular agency of the company, but a place where they advertised tickets at reduced rates. He further testified that he paid for the ticket one dollar less than the current rates. The conductor refused to receive the ticket, and upon plaintiff's refusing to pay the fare put him off the train at Elizabeth. The present suit was then brought. The court on motion of defendant awarded a nonsuit, which the court in banc subsequently declined to take off. Plaintiff thereupon took this writ, assigning for error the granting of the nonsuit and the refusal to take off the same.

Mr. Justice TRUNKEY. The parties agree that this case presents a single question, whether a person purchasing a ticket over the Pennsylvania Railroad from New York to Philadelphia, from a ticket dealer who is not an authorized agent of the company, can maintain an action in the courts of this state for the refusal of the company to carry him between these points in return for said ticket.

By the act of May 6, 1863 (P. L. 582), it is made the duty of every railroad company to provide each agent authorized to sell tickets entitling the holder to travel upon its road, with a certificate attested by the corporate seal and the signature of the officer whose name is signed to the tickets. And any person not possessed of such authority, who shall sell, barter, or transfer, for any consideration, the whole or any part of a ticket, or other evidence of the holder's title to travel on any railroad, shall be deemed guilty of a misdemeanor, and shall be liable to be punished by fine and imprisonment. The purchasing and using a ticket from a person who has no authority to sell, is not made an offence.

That the plaintiff's ticket, on its face, entitled him to the rights of a passenger between the points named, is unquestioned. The only reason for denying him such right was that he bought from one who sold in violation of the statute in Pennsylvania. It is not said that the vendor in New York is actually guilty of the statutory offence, but that the defendant, being a corporation in Pennsylvania, and the stipulated right of passage being partly in Pennsylvania, her courts will not enforce a contract resting upon acts which the Legislature has declared criminal.

The presumption is that the ticket was properly issued by the company, and that the holder had the right to use it. Such tickets are evidence of the holder's title to travel on the railroad. Prior to the statute in Pennsylvania, it was lawful for holders to sell them.

The property in them passes by delivery. The act of 1863 confers no right upon a railroad company to question passengers as to when, or where, or how they procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was the mere purchase of the obligation of a common carrier, to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the bona fide holder to performance, and for breach to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania, it is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, "this action is to enforce not the contract between the ticket scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error."

The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. Surely it is not an exception to the rule that contracts, valid by the law of the place where they are made, are generally valid everywhere. Then, as the plaintiff has a valid title to the ticket, the contract between the defendant and himself is valid.

Judgment reversed and procedendo awarded.[8]

[8] In Shankland v. City of Washington, 5 Pet. 390, 8 L. Ed. 166 (1831), Story, J., said: "As owner and possessor of the whole [lottery] ticket, if he had made sale of the whole, * * * he would have substituted another as possessor and transferee, to whom the original promise of the corporation would then have attached."

The transferability of a ticket is not affected by its being an excursion ticket, or by being sold at a reduced rate, or by having been used for the outward trip, or for any part of the journey for which the carrier to whom it is presented has not contracted. Evans v. St. Louis, etc., Ry. Co., 11 Mo. App. 463 (1882), "holder agrees to use on or before date canceled"; Carsten v. No. Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589 (1890); Nichols v. So. Pac. Co., 23 Or. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664 (1892); The Willamette Valley (D. C.) 71 Fed. 712 (1896).

But a right under a single undertaking for continuous carriage is incapable of being divided, and a ticket for such carriage, partly used and then assigned, is invalid in the hands of the assignee. Walker v. Wabash, etc., Ry. Co., 15 Mo. App. 333 (1884). Compare Curlander v. Pullman, etc., Co. (Balt. Super. Ct.) 28 Chicago Legal News, 68, 9 Harv. Law Rev. 354 (1895), right to occupy section in sleeping car.

TICKETS EXPRESSLY MADE NONTRANSFERABLE.—In Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171 (1907), the railroad company obtained an injunction restraining ticket brokers from dealing in nontransferable round trip tickets. White, J., said: "That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser but upon any one who acquired such a ticket and attempted to use the same in violation of its terms is also settled. Mosher v. Railroad Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249. See, also, Boylan v. Hot Springs Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290. * * * Any third person acquiring a nontransferable reduced rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein which a court of equity would protect. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, and authorities there cited. See, also, Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 128 Fed. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is Angle v. Chicago, St. Paul, etc., Ry. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, where it was held that an actionable wrong is committed by one who 'maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other.' That this principle embraces a case like the present—that is, the carrying on of the business of purchasing and selling nontransferable reduced rate railroad tickets for profit to the injury of the railroad company issuing such tickets—is, we think, clear. It is not necessary that the ingredient of actual malice, in the

## HARP v. SOUTHERN RY. CO.

(Supreme Court of Georgia, 1904. 119 Ga. 927, 47 S. E. 206, 100 Am. St. Rep. 212.)

Harp, a minor of 16, sued the Southern Railway Company for a wrongful ejectment. He alleges that he bought a ticket entitling him to ride from Atlanta to Topeka Junction, in Upson county, on the line of defendant's road, passing through Clayton; that while on the rear platform of the train an employé of the company asked him how far he was going, whereupon the plaintiff showed him the ticket; that the employé looked at it and handed it back to the plaintiff, when the ticket was blown out of plaintiff's hands; that shortly thereafter the conductor asked the plaintiff for his ticket, and he, in the presence of the employé, explained the circumstances of its loss, the employé corroborating his statement; that notwithstanding this fact the conductor ordered the plaintiff to leave the train, and put his hand on him for the purpose of removing plaintiff from the moving car, and, to prevent being violently ejected, the plaintiff leaped from the car, running at from 10 to 15 miles an hour, about half a mile before reaching Riverdale; that, when plaintiff handed the ticket to the employé, he thought the latter was the conductor; that he was compelled to walk to Atlanta, 14 or 15 miles; that there were few passengers for Topeka, and that it would have been easy on arriving at Riverdale for the conductor to have telegraphed to Atlanta, and verified petitioner's statement that he had purchased the ticket to the station named; that petitioner was young and unaccustomed to travel, and did not have sufficient money to pay his fare from Atlanta to Topeka at the time a ticket was demanded; and that the manner of his ejection was aggravated by the threats and commands of the conductor.

sense of personal ill will, should exist to bring this controversy within the doctrine of the Angle case."

DEFENSES AVAILABLE AGAINST PURCHASER IN GOOD FAITH.—In Snyder v. Wolfley, 8 Serg. & R. (Pa.) 328 (1822), a lottery ticket stolen from the plaintiff thereafter drew a prize. It was held that the plaintiff was entitled to receive the money, but only on giving indemnity against claim by another. Gibson, J., said: "Now, in the case before us, the fruits of the ticket were payable to the bearer; and the defendant could not resist payment of it in the hands of a bona fide holder for valuable consideration, even though it should originally have been stolen."

In Frank v. Ingalls, 41 Ohio St. 560 (1885), a carrier maintained replevin for a railroad ticket against a purchaser in good faith and for value from one who had obtained it by fraud.

In Levinson v. Texas, etc., Ry. Co., 17 Tex. Civ. App. 617, 43 S. W. 901 (1897), a ticket used, but not taken up or canceled, was held invalid in the hands of an innocent purchaser for value.

See, also, Walker v. Price, 62 Kan. 327, 62 Pac. 1001, 84 Am. St. Rep. 392 (1900), to the effect that the transferee of a ticket acquires only such right as appears on the face of the ticket, though his transferror's right, unknown to the transferee, was greater.

The defendant demurred generally and specially, on the grounds that there was no cause of action set out; that the petition was duplicitous; that it was uncertain whether the action was for an illegal eviction, or for an abuse of duty in a lawful eviction. After argument the court passed an order reciting that "the plaintiff admitted that the suit was only for the wrongful expulsion, and that the company had a regulation authorizing conductors to eject passengers who neither paid fare nor produced a ticket," and directing that the general demurrer to the original and amended petition be sustained, and the case dismissed. In plaintiff's brief, he requests that, if the judgment be affirmed, leave be granted him to amend by alleging that the conductor failed to demand the cash fare.

LAMAR, J.* This suit was for wrongful expulsion, and not for damages inflicted upon the plaintiff as a result of his being compelled to alight from a moving train. The fact that one actually purchased a ticket, and that this was known to the agent who sold it, or to the gatekeeper who examined it, or to employés on the train who saw it, would not relieve the passenger of the obligation to surrender it to the conductor. Tickets vary in their terms. Some are good only on certain trains; others only on particular dates; others require validation. The mere fact that the plaintiff has a ticket does not, therefore, necessarily establish his right to be transported on a given train. These matters must be passed on by the conductor, and not by other employés who are not charged with this duty by the company. When the conductor makes his demand, he is entitled to have the ticket surrendered. He cannot be required to hear evidence or investigate the bona fides of the passenger's excuse for its nondelivery, nor to wait until he arrives at the next station, and, by telegraphic correspondence with the selling agent, undertake to verify the correctness of the plaintiff's statement, or determine the character and validity of the ticket sold.

It is manifest that such course would necessarily give rise to delay, and seriously interfere with the operation of trains and the rights of the traveling public. Had the plaintiff's money blown out of his hand, it is evident that his misfortune would have to fall upon himself, and not upon the company. Such loss would not have prevented his lawful eviction. The same result would follow where the ticket itself was lost, for it might have come into the hands of another, and the company might thereby have been compelled to carry two passengers for one fare. Besides, any rule allowing an excuse as a substitute for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the courts have uniformly held that the failure to pay the fare or produce the ticket warrants an eviction. In fact, the plaintiff in error concedes the general rule to be that the passenger must produce his ticket, pay his fare, or suffer

* Part of the opinion relating to plaintiff's right to amend has been omitted.

expulsion. He insists, however, that the special circumstances take this case out of the general rule. We fail to find any case warranting such a holding. Those cited by him, including Sloane v. Railroad Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, and Scofield v. Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, as well as Pullman P. C. Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232, were on facts essentially different. See, on the general subject, L. & N. R. Co. v. Fleming, 14 Lea (Tenn.) 128; Rogers v. Atlantic City R. Co., 57 N. J. Law, 703, 34 Atl. 11; Fetter on Carriers, § 279. Compare Southern Ry. Co. v. De Saussure, 116 Ga. 53, 42 S. E. 479; G. S. & F. Ry. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Pleadings are to be strictly construed against the pleader. Here it affirmatively appears that plaintiff did not have funds with which to pay the cash fare. * * * There is nothing in the facts here to require the exercise of any discretionary power by this court to permit such amendment. Judgment affirmed.[10]

[10] Acc. Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 128 (1884), ticket lost after being shown at gate and seen by passengers on train; Tex. & P. R. Co. v. Smith, 38 Tex. Civ. App. 4, 84 S. W. 852 (1905), trunk check offered as proof of having had ticket. And see Nutter v. So. Ry., 78 S. W. 470, 25 Ky. Law Rep. 1700 (1904), ticket intrusted to fellow passenger, who was left behind at station; Crawford v. Cin., etc., R. Co., 26 Ohio St. 580 (1875), owner of lost nontransferable mileage ticket not entitled to be carried, though railroad refused to replace it; So. Ry. Co. v. De Saussure, 116 Ga. 53, 42 S. E. 479 (1902), railroad, though tendered indemnity, not bound to issue duplicate of lost reduced rate ticket good for so many trips on presentation to conductor.

Compare Pullman Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232 (1874), where a passenger, after showing his sleeping car ticket to the porter who pointed out his berth, lost the ticket, but obtained from the ticket agent a certificate that he had paid for that berth. Scholfield, J., said: "We think the better rule is to require that, where the proof is clear and satisfactory, as it was in the present case, the applicant for the berth has bought his ticket, but has lost it, and it is limited to a particular berth and trip, and the circumstances are such that it is reasonably certain the company cannot be defrauded by the ticket being in the hands of another, he should have the berth. * * * He may purchase for another, or, purchasing for himself, may subsequently change his mind and sell to another. A contest might thus arise between one claiming the berth because he had purchased the ticket, and another claiming it because he was the owner of the ticket, leaving the company to act at its peril in deciding between them."

In Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125 (1876), a conductor took up a ticket, and "as an equivalent therefor" put a check in the passenger's hatband. It was not a through train, and the passenger had to change to a train in charge of another conductor. There was no evidence that he knew there would be a change of conductors. When called on for his ticket, he could not find his check, and was ejected for refusing to pay fare. It was held that the action of the carrier was justified. Wheeler, J., said: "When the plaintiff bought the ticket at Worcester, with coupons attached, entitling the holder to ride over that part of defendants' road he was riding on when ejected, he did not make any agreement with them or their agents that they would carry him in person over it as carriers agree to carry particular packages over their routes; but he bought what was symbolic evidence of a right that whoever should have it might ride, and what any other person could use as well as he. The title to it, and right to a passage upon it, would pass by mere delivery, and whoever should have it could pay the fare of a passenger

## FREDERICK v. MARQUETTE H. & O. R. CO.

(Supreme Court of Michigan, 1877. 37 Mich. 342, 26 Am. Rep. 531.)

MARSTON, J.[11] This is an action on the case, brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plaintiff tended to show that on the evening of January 29, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office $1 from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining 65 cents for the ticket, the regular fare to Marquette; that plaintiff did not attempt to read what was on his ticket, nor did he count the change received back until next morning, or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay 35 cents more. Plaintiff insisted he had paid his fare and purchased his ticket to Marquette, and refused to pay the additional fare, whereupon he was ejected from the train, etc.

On the part of the defendant evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan, and not for Marquette. Under the pleadings and charge of the court, other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the

with it by delivering it in payment; but the mere fact of having had it, without having it to deliver in payment on reasonable request, would not entitle any one to the passage, any more than having a sufficient amount of money to pay the fare with, without paying it, would. * * * But, according to the facts, the conductor did not take the coupon as an equivalent for the full passage, but only for the passage so far as he was to go as conductor, and gave the plaintiff the white check as evidence in lieu of the coupon, more symbolic, but equally effective of the right to a passage the rest of the way. * * * And although it was delivered to him only by placing it in his hatband, as he did not object, that was as much a delivery to him as placing it in his lap or in his hand would have been, and was sufficient to invest him with the ownership of it, and to bind him to take care of it as his own property. While he held that check he had not paid his fare beyond where the conductor was to go, but had what would pay it, or that of any other person, the rest of the way. * * * When he had lost it, the loss was his, and he was situated as he would have been if the coupon had been returned to him, and he had lost that, and as any one would be who had bought a ticket to an opera or a lecture, or that would entitle the holder of it to any other privilege, and had lost it. Having lost it, he was called upon by the proper conductor to pay his fare. He had not any ticket or check to pay it with, and refused to pay it in money, consequently, there was a refusal to pay it at all, and the conductor rightfully expelled him from the train."

[11] Part of the opinion of Marston, J., is omitted.

action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case. * * *

It is within the common knowledge or experience of all travelers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried, that these tickets are presented to the conductor or person in charge of the train, and that he accepts unhesitatingly of such tickets as evidence of the contract entered into between the passenger and his principal. It is equally well known that the conductor has but seldom, if ever, any other means of ascertaining, within time to be of any avail, the terms of the contract, unless he relies upon the statement of the passenger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount of business done, the agent in charge of the office, and who sold the ticket, could give but very little, if any, information upon the subject. That this system of issuing tickets, in a very large majority of cases, works well, causing but very little, if any, annoyance to passengers generally, must be admitted. There, of course, will be cases where a passenger who has lost his ticket, or where through mistake the wrong ticket had been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situate, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it was designed to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects. It enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued, and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement, where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold, or if the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways —one, the evidence afforded by the ticket; the other, the statement of

the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts, which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract. but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed, the following, we think, will be found amply sufficient, and we do not consider it necessary to analyze or review them: Townsend v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 298, 15 Am. Rep. 419; Hibbard v. N. Y. & E. R. R., 15 N. Y. 470; Bennett v. N. Y. C. & H. R. R., 5 Hun (N. Y.) 600; Downs v. N. Y. & N. H. R. R., 36 Conn. 287, 4 Am. Rep. 77; C., B. & Q. R. R. v. Griffin, 68 Ill. 499; Pullman P. C. Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232 [ante, p. 214, note]; Shelton v. Lake Shore, etc., Ry. Co., 29 Ohio St. 214.

I am of opinion that the judgment should be affirmed, with costs.

COOLEY, C. J., concurred.

GRAVES, J. By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained and paid for; and having ridden under it the distance which it authorized, and refusing to repay for the space beyond, the plaintiff was removed from the cars.

This removal may, or may not, have constituted a cause of action, but it is not the cause of action charged. The declaration sets up that plaintiff's ticket was a proper one for the whole distance and

that he was removed in violation of the right which the ticket made known to the conductor.

There was no proof of the case alleged, and I agree therefore in affirming the judgment.

CAMPBELL, J. The plaintiff's cause of action in this case was for the failure of the company to carry him to a destination to which he had paid the passage money, and the immediate occasion for his removal from the cars was that he was given a wrong ticket, and was not furnished with such a one as the conductor was instructed to recognize as entitling him to the complete carriage. His declaration should have been framed on this theory. Had it been so framed, I am not prepared to say that he may not have had a right of action for more than the difference in the passage money.

But as he counted on the failure of the conductor to respect a correct ticket, and it appears that the conductor gave him all the rights which the ticket produced called for, there was no cause of action made out under the declaration, and the rule of damages need not be considered. I concur in affirming the judgment.

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## HUFFORD v. GRAND RAPIDS & I. R. CO.

**(Supreme Court of Michigan, 1887. 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859.)**

SHERWOOD, J.[12] In this case the plaintiff sues the defendant for an alleged assault and battery, which he avers was committed upon him on the 19th day of September, 1882, by one of the conductors of the defendant, while he was riding upon one of its trains, without any justification. The case was tried before Judge Montgomery in the Kent circuit by jury, and the plaintiff failed to recover, and now brings error.

* * * The ticket held by the plaintiff, when purchased by him at Manton, was represented to him by the agent as good to Traverse City. * * * The ticket purchased was part of an excursion ticket, good when first issued for a ride from Sturgis to Traverse City. After the plaintiff had purchased and paid for the ticket, he observed it did not look like the tickets he had been accustomed to purchase, and thereupon he returned to the ticket office, and asked the agent if it was good, and was informed by the agent it was. He then entered the defendant's passenger coach, and the train moved on for Walton Junction.

When the conductor asked for the plaintiff's fare, he delivered to him the ticket he had thus purchased. The conductor told plaintiff

[12] Parts of the opinion have been omitted.

he could not receive it for his fare, whereupon plaintiff informed the conductor that he bought the ticket at Manton of the company's agent, and was informed by him it was good; that he paid the agent for the ticket, and he should not pay his fare again. The conductor then laid his hand upon plaintiff's shoulder, and rang the bell, and told the plaintiff, unless he paid the fare, which was 25 cents, he would put the plaintiff off the train. The plaintiff then under protest paid the fare demanded of him.

These facts appear by the record, and are not disputed. Whether or not the ticket had been canceled between Grand Rapids and Walton Junction by conductor's marks was a fact contested before the jury, and upon this subject the court charged the jury: "If the ticket had been cancelled between those points, then upon its face it was an invalid ticket, and, when the fact was called to the attention of the plaintiff, he had no longer a right to insist upon being transferred over this line upon that ticket." * * *

There seems to be no question but that the plaintiff purchased his ticket of an agent of the company, who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agent had the right to sell to passengers. The plaintiff had a right to rely upon the statements of the agent that it was good, and entitled him to a ride between the two stations. It was a contract for a ride between the two stations that the defendant's agent had a right to make, and did make, with the plaintiff.

The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company nor any of its agents could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of the company for the control of the action of its agents and the management of its affairs.

When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks. All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed. On the undisputed facts in this case, I think the plaintiff was entitled to go to

Walton Junction upon the ticket he presented to the conductor. Maroney v. Old Colony & N. Ry. Co., 106 Mass. 153, 8 Am. Rep. 305; Murdock v. Boston & A. R. Co., 137 Mass. 293, 50 Am. Rep. 307. See this case in 53 Mich. 118, 18 N. W. 580. * * *

The judgment must be reversed and a new trial granted.[13]

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## INDIANAPOLIS ST. RY. CO. v. WILSON.

(Supreme Court of Indiana, 1903. 161 Ind. 153, 66 N. E. 950, 100 Am. St. Rep. 261.)

JORDAN, J.[14] Action by appellee against appellant to recover damages for an unlawful expulsion from one of its street cars. A trial

[13] Acc. Murdock v. Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307 (1884), ticket sold with statement that in spite of being punched it was valid; Erie R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71 (1892), canceled ticket issued as good for stopover; Kansas City, etc., R. Co. v. Foster, 134 Ala. 244, 32 South. 773, 92 Am. St. Rep. 25 (1902), ticket to Byhalia issued with statement that such a ticket was good to Birmingham; Ill. Cent. R. Co. v. Harper, 83 Miss. 560, 35 South. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469 (1904), ticket sold with statement it was good over either route; Scofield v. Pa. Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224 (1902), ticket sold with statement it was good for stopover. And see Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376 (1903), ticket holder who took a train at direction of ticket seller and brakeman recovered damages for being ejected, though it did not carry passengers or stop at destination.

In the following cases the passenger was held to be entitled to ride on a ticket that seemed invalid: So. Pac. Co. v. Bailey (Tex. Civ. App.) 91 S. W. 820 (1906), nontransferable tickets with blanks for description and signature of passenger filled in by description and signature of daughter who bought for herself and mother; Chicago, etc., R. Co. v. Pendergast, 75 Ill. App. 133 (1897), ticket "good only for passage of purchaser whose name and description appear in margin," signed to selling agent's knowledge in assumed name; Erie R. Co. v. Littell, 128 Fed. 546, 63 C. C. A. 44 (1904), defendant company succeeded through foreclosure sale to operation of road formerly owned by insolvent company, and defendant's agent violated instructions by selling tickets, left on hand, which bore its predecessor's name; Phil. Co. v. Rice, 64 Md. 63, 21 Atl. 97 (1885), previous conductor marked ticket "Canceled by mistake," the rules requiring him to correct mistakes by the word "Error," subscribed by his initials; Ellsworth v. C., B. & Q. R. Co., 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173 (1895), ticket "good one day from date of sale," stamped by mistake as sold several days before. Compare Monnier v. N. Y., etc., R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619 (1903), post, p. 556.

In the following cases tickets were held to entitle the holder to carriage, though in appearance doubtful: Laird v. Traction Co., 166 Pa. 4, 31 Atl. 51 (1895), transfer punched by mistake at two different hours; Trice v. Ches. & O. Ry. Co., 40 W. Va. 271, 21 S. E. 1022 (1895), mileage ticket good for a year, stamped "Sold March, 1892, to expire March, 1894," the figure 4 being altered from 3 in ink; Northern Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422 (1892), date illegible; Wightman v. Chicago, etc., R. Co., 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778 (1888), not good if "detached" means "intentionally detached," and a coupon is good though accidentally separated from the body of the ticket. And see Koch v. N. Y. City R. Co. (Sup.) 95 N. Y. Supp. 559 (1905).

[14] Parts of the opinion have been omitted.

by jury resulted in appellee being awarded damages, and, over appellant's motion for a new trial, judgment was rendered on the verdict of the jury. From this judgment appellant appeals, and the sole question involved is, can the expulsion of appellee by appellant from its car, under the circumstances, be legally justified? * * *

It is shown that appellee on the evening of September 23, 1899, took passage upon one of appellant's cars running on and over its College Avenue line, and upon paying his fare he requested the conductor in charge of said car to give him a transfer ticket to the Virginia Avenue line, his destination being a point on the latter line. Upon his taking passage on one of the cars running on and over the Virginia Avenue line the conductor in charge of said car demanded fare of appellee, and the latter tendered to said conductor the transfer ticket which he had received from the College Avenue conductor. * * * In punching the transfer ticket in question it appears that the College Avenue conductor had awkwardly used the punch, and, instead of plainly indicating that appellee had been transferred to the Virginia Avenue line, he punched out what might be said to be the entire space opposite South East street, and also a part of the Virginia Avenue space, the puncture made extending across the line dividing the two spaces, and this, as it seems, gave rise to the controversy between the appellee and the conductor of the Virginia Avenue line; the latter insisting that the ticket indicated that the former had been transferred to the South East Street line, while appellee, on the other hand, insisted that he had requested a transfer to the Virginia Avenue line, and stated that he believed the ticket indicated such transfer. Upon appellee's refusal to pay the additional fare which the conductor on the Virginia Avenue line demanded, he was forcibly ejected from the car by the conductor and motorman. * * *

There is a line of decisions which affirm the rule that the ticket must be considered as conclusive evidence of the passenger's rights, although it may not, in its true sense, express or evidence the contract into which the passenger and the carrier entered. These cases hold that, in the event a ticket is defective, the defects of which are due to the negligence or carelessness of the agent or agents of the carrier, then, under the circumstances, the expulsion of the holder thereof, upon his refusal to pay the additional fare required, is justified. While, on the other hand, there is another long line of cases which rule to the contrary, and deny the conclusive force of a ticket furnished by the carrier to the passenger. The latter cases, in effect, affirm that the ticket is only the evidence of the contract as made between the passenger and the carrier, and, if it fails to disclose the true contract, its infirmity or fault in this respect must be charged to the carrier, and the latter is liable for the natural consequences resulting by reason of the defects in the ticket due to the negligence of its agents. They affirm the rule that, inasmuch as the passenger is neither required under the law, nor in fact permitted, to print, write,

or stamp the ticket, or to have anything to do whatever with its preparation, this privilege or right being reserved by the carrier to itself, therefore the passenger has the right to believe or presume, in the absence of notice to the contrary, that the ticket furnished and delivered to him is a correct expression of the contract as made between him and the carrier. The following authorities or cases decided by the higher courts of other states are adverse to the contention of counsel for appellant in the case at bar. [The citations are omitted.]

The extent to which these cases support the doctrine in question and sustain appellee's right to a recovery in this case is that where the passenger is aboard the cars of the carrier without the proper evidence or token of his right of passage, which is due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, then, under such circumstances, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in regard to the ticket in dispute. An examination of the cases pro and con upon the question herein involved convinces us that the weight of authority and the better reason are against the contention of counsel for appellant, and that the right of the appellee to recover under the facts in this appeal is well supported by the decisions of our own, as well as other courts. * * * There can be no sound reason advanced for holding that such a voucher or token, as is a passage ticket in its ordinary form, must be regarded or considered as the exclusive evidence of the passenger's right to be carried, and that the agent of the carrier may, over the reasonable explanations or statements of the passenger in regard to his right to be carried thereon, expel him from the car on which he has taken passage, unless he pays the extra fare demanded, without subjecting the carrier to damages by reason of such expulsion, where the latter, under the circumstances, as between the passenger and the carrier company, is shown to have been wrongful.

When the case at bar, under the facts, is tested by the principles affirmed by the authorities to which we have referred, the conclusion which we reach will be found to be amply sustained upon cogent and sound reason. The fact that the wrong of which appellee complains may be said to be due to the combined faults of two of appellant's conductors or agents exerts no material influence over his right to recover, for, under the circumstances, appellant must be presumed to have been present and acting at the time through the agency of the conductor who issued the transfer ticket, and through the agency of the other, who, over the explanations of appellee in regard to the issue of the ticket, refused to accept it, and thereupon expelled him from the car upon which, as shown, he was entitled to be carried.

The mistake which the first conductor made in failing plainly to point out or indicate upon the transfer ticket the line to which appellee had requested to be transferred in the eye of the law, must be considered as the mistake or fault of the appellant. And the latter must

be treated or regarded as a wrongdoer in not honoring the ticket when it was presented by appellee to the second conductor, and in expelling him from the car, over his explanations in respect to the issue of the ticket. These explanations it should have accepted as true until the contrary was shown. It was certainly as much the duty of the appellant to correct the mistake which it had made in punching the ticket in the first instance when the opportunity to do so was presented to it through the agency of the second conductor, as would have been its duty to have rectified the same had the attention of the first conductor been called to the mistake by appellee before he left the College Avenue car. Consequently there is no force or merit in the contention that he should have examined the transfer ticket which he received before leaving the car, and have presented it to the conductor who issued it, in order that the mistake made by him in punching the ticket might be corrected.

We have given the propositions presented in this appeal a patient consideration. All of them lead up to the single question, can the expulsion of appellee, under the circumstances in this case, be justified? As previously indicated, we are constrained to answer this question in the negative. Judgment affirmed.[15]

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## NORTON v. CONSOLIDATED RY. CO.

(Supreme Court of Errors of Connecticut, 1906. 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132.)

HALL, J.[16] * * * This is an action to recover damages for the alleged tort of the defendant's servant in attempting to forcibly eject the plaintiff from the car, and not for the recovery of damages for a breach of the contract of carriage between the plaintiff and defendant. The defendant justifies the attempted expulsion of the plaintiff upon the ground that the latter unlawfully persisted in remaining and riding in the car, without either paying his fare or producing a transfer ticket purporting to entitle him to ride in that car; and that no unreasonable force was used in the attempt to remove him. As it is found that no unnecessary force was employed, the case must turn upon the question of whether, upon the facts stated, the plaintiff had the right to insist upon being carried upon the transfer ticket which

[15] Gillett, J., with whom Monks, J., concurred, delivered a dissenting opinion.

Acc. O'Rourke v. St. Ry. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639 (1899); Ga. Ry. & El. Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. Rep. 246 (1906); Cleveland City Ry. Co. v. Conner, 74 Ohio St. 225, 78 N. E. 376 (1906), but it seems passenger must not be negligent. And see Lawshe v. Tacoma, etc., Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350 (1902).

[16] Parts of the opinion have been omitted.

he presented, and to forcibly resist the conductor's attempt to expel him.

The plaintiff contends that though the transfer check may have been prima facie evidence of a different contract of carriage, yet the facts show that when he paid his fare to the conductor upon the Savin Rock car, and requested of him a transfer to Winchester Avenue, the real undertaking of the defendant was to carry him by a Winchester Avenue car, and that having informed the conductor of the Winchester Avenue car of these facts, and of the mistake of the conductor of the Savin Rock car in wrongly punching the transfer, he was entitled to be carried upon the Winchester Avenue car. In the absence of any statutory or other express provision or regulation defining the contract of carriage between electric street railway companies, and the rights of their passengers in cases like the present, they must be ascertained by considering all the circumstances indicating the intention and understanding of both parties including not only what is required for the reasonable safety, convenience and comfort of passengers, but what is reasonably necessary to enable the company to properly perform the functions for which it was created and what the known and reasonable rules of the company are with reference to which the parties are presumed to have contracted.

There are certain facts and established rules connected with the operation of electric street railways, which in these days are familiar to every person of ordinary intelligence who has occasion to ride on them, and which are to be regarded in determining what the real contract of carriage is in a case like the present one. Among them are these: That the mere payment of the ordinary fare in a street car does not, of itself, as upon a steam railroad, indicate the destination of the passenger, nor suggest that he desires transportation by another line and upon another car; that a passenger upon one line desiring to be transferred to another, operated by the same company, must pay his cash fare on the first car; that upon such payment he will be carried, in that car, to the point of transfer to the second line; that before leaving the first car he must obtain from the conductor of it a ticket indicating upon its face his right to take passage upon a car of the second line; that as to the conductor upon the second car, the person receiving such transfer ticket enters that car like all other passengers taking the car at that point, and will not be permitted to ride unless he either pays his fare or presents a proper transfer; that it is the office of the conductor of the second car to determine the right of the passenger to ride upon that car, and that upon the presentation of a transfer ticket, the ticket itself is the only evidence of such right which the conductor can properly accept.

In our opinion, the facts fail to show that when, on the Savin Rock car, the plaintiff paid his fare and asked for a transfer to Winchester Avenue, the defendant undertook absolutely to carry him upon a Winchester Avenue car, even if he failed to either pay his fare, or present

a proper transfer ticket on that car. They show that the real contract of the defendant was to carry the plaintiff, upon the first car, to the proper point of transfer to the second line; to furnish him a proper transfer ticket to entitle him to a passage on a car of the second line; and to carry him upon that line, upon the presentment of such transfer or the payment of his fare to the conductor of the second car. Through the carelessness of its servant, in not giving the plaintiff the transfer ticket which he asked for, the defendant failed to perform its contract. For such breach of contract the plaintiff would have been entitled to compensation for the loss or injury, had there been any, which necessarily followed from the defendant's failure to furnish him a proper transfer ticket. His remedy for such breach of contract was not to refuse to pay his fare, and to forcibly resist being expelled from the car. As the transfer ticket which he presented did not even purport to authorize him to ride on a Winchester Avenue car, the conductor of that car, notwithstanding the plaintiff's explanation of the mistake, was justified in refusing to accept it, and in requiring him to pay his fare or leave the car, and after the demands made by the conductor, it became the plaintiff's duty to either pay his fare or peaceably leave the car [citing authorities].

A rule requiring the expulsion from a car of a passenger who refuses to either pay his fare or produce a ticket showing his right to ride on such car is a reasonable one (Downs v. New York & N. H. R. Co., 36 Conn. 287, 291, 4 Am. Rep. 77; Havens v. Hartford & N. H. R. Co., 28 Conn. 69, 88; Townsend v. New York C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Shelton v. Lake Shore & M. S. R. Co., 29 Ohio St. 214), and one which, from the fact that it is so general with carriers, as well as from the facts found in this case, was evidently well known to the plaintiff. In ascertaining whether the plaintiff was entitled to ride on the Winchester Avenue car, it was not the duty of the conductor of that car to accept the statement made to him by the plaintiff that the mistake in his transfer was the fault of the conductor of the Savin Rock car. Townsend v. New York C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Downs v. Hartford & N. H. R. Co., 36 Conn. 287, 291, 4 Am. Rep. 77. As between the second conductor and the plaintiff, the transfer ticket was conclusive as to the latter's right to be carried as a transferred passenger upon the Winchester Avenue car. "As between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive, and the right to ride upon it on that train is, for the time being, to be determined accordingly." Baldwin on American Railroad Law, p. 292; Mosher v. St. Louis, I. M. & S. Ry. Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; Pouilin v. Canadian Pac. Ry. Co., 3 C. C. A. 23, 52 Fed. 197, 17 L. R. A. 800, and cases above cited.

There is a conflict of authorities in other jurisdictions upon the questions of the conclusive character of such a ticket, as between the

passenger offering it and the conductor to whom it is presented; of the terms of the contract of carriage; and of the right of the passenger to forcibly resist expulsion in cases like the present one. In the case of Indianapolis Street Ry. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261, decided in 1903, in which the claims of the present plaintiff are sustained by the majority opinion, these questions are very ably discussed and the authorities fully cited upon both sides. In our view the dissenting opinion of Judge Gillett, in which Judge Monks concurred, is sustained by the better reasons and by the greater weight of authority.

Our conclusion is that the plaintiff, having by his own wrongful conduct invited the use of force, cannot now complain of the use by the defendant of reasonable force in the attempt to remove him from the car. The trial court erred in holding that the plaintiff was entitled to substantial damages.

There is error, and the case is remanded for the assessment of nominal damages. In this opinion the other Judges concurred.[17]

[17] In Bradshaw v. So. Boston Co., 135 Mass. 407, 46 Am. Rep. 481 (1883), and Keen v. Detroit El. Ry., 123 Mich. 247, 81 N. W. 1084, (1900), actions of tort for ejecting a passenger who presented a wrong transfer check given him by the carrier's mistake, the carrier had judgment. And see 20 Harv. Law Rev. 137.

The following cases treat a ticket or the sale of a ticket as ordinarily importing only an undertaking to accept such ticket in payment of fare according to the import of the ticket itself, and hold that it imposes no obligation to carry the passenger on a journey for which on its face it is insufficient. Poullin v. Canadian Pac. Ry. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800 (1892); Spink v. Louisville, etc., R. Co. (Ky.) 52 S. W. 1067 (1899); Brown v. Rapid Ry. Co., 134 Mich. 591, 96 N. W. 925 (1903); Western Md. Ry. Co. v. Schaun, 97 Md. 563, 55 Atl. 701 (1903). See, also, C., B. & Q. R. Co. v. Griffin, 68 Ill. 499 (1873); Peabody v. Oregon Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823 (1891); Chicago, etc., Co. v. Stratton, 111 Ill. App. 142 (1903); Chase v. Railway Co., 70 Kan. 546, 79 Pac. 153 (1905); 1 Harv. Law Rev. 17; 9 Harv. Law Rev. 353; 14 Harv. Law Rev. 70.

On this theory, a passenger without a ticket is not entitled to be carried, though his not having a ticket is due to the carrier's default. Townsend v. N. Y. C. R. Co., 56 N. Y. 295, 15 Am. Rep. 419 (1874), ticket taken up without giving conductor's check; Shelton v. Lake Shore Ry. Co., 29 Ohio St. 214 (1876), commutation ticket taken up before completely used; McKay v. Ohio R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913 (1890), conductor took up return coupon on outward trip, outward coupon not good for return trip; Mahoney v. Detroit Co., 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. Rep. 528 (1892), passenger directed to change to another street car without giving him transfer check; Van Dusan v. Gd. Tk. Ry. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354 (1893), where conductor takes up outward coupon of round-trip ticket, without giving check for rest of outward passage, passenger not entitled to continue outward trip on return coupon.

But it has been held that a passenger is entitled to ride if the carrier knows that he is entitled to a ticket, which through the carrier's default he has not been able to get. St. Louis, etc., Co. v. Dalby, 19 Ill. 353 (1857); East Tenn. Ry. Co. v. King, 88 Ga. 443, 14 S. E. 708 (1892), conductor ejected, though convinced that former conductor had collected ticket without giving check; Cherry v. Kansas City R. Co., 52 Mo. App. 499 (1893), ejectment by conductor who had previously withheld stopover check; Scofield v. Pa. Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224 (1902), stopover check refused. And see Cinn., etc.,

Ry. Co. v. Harris, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A. (N. S.) 779 (1905), railroad liable for conductor's insults to passenger holding order for ticket which he had been denied opportunity to procure.

The following cases treat the purchase of a ticket as the purchase of a right to be carried on condition that the passenger present the ticket issued in token of his right, and hold that the passenger on presenting the ticket, and, if on its face it is insufficient, on giving such evidence of the facts as is available, though it is only his own statement, is entitled to be carried by virtue of the right he has purchased: St. Louis, etc., R. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766 (1888); Alabama, etc., R. Co. v. Holmes, 75 Miss. 371, 23 South. 187 (1898); and cases cited in note, page 223. See, also, Yorton v. Milwaukee, etc., Ry. Co., 62 Wis. 367, 21 N. W. 516 (1885); Ga. Ry. Co. v. Olds, 77 Ga. 673 (1886); Ill. Cent. R. Co. v. Jackson, 117 Ky. 900, 79 S. W. 1187 (1904).

The same result is reached where the passenger has been deprived of his ticket by the carrier's act or default. Kansas City R. Co. v. Riley, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309 (1891), outward coupon valid for return passage where conductor mistakenly took up return coupon on outward trip. And see Pittsburg R. Co. v. Hennigh, 39 Ind. 509 (1872), first conductor took up ticket, and second conductor on same train ejected on refusal to pay fare.

But one who, by not explaining or by explaining wrongly the mistake in his ticket, leads the conductor to believe it invalid cannot have damages for being compelled to leave the train. Petrie v. Pa. Co., 42 N. J. Law, 449 (1880); White v. Grand Rapids R. Co., 107 Mich. 681, 65 N. W. 521 (1895); Alabama, etc., Co. v. Drummond, 73 Miss. 813, 20 South. 7 (1896).

If a passenger is entitled to be carried without further payment of fare, it is a breach of duty to require him to pay fare or leave the train, and if he refuses to pay he may have his damages for being compelled to leave. "If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that, under such circumstances, he was put off the train, was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby." Lamar, J., in Erie R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71 (1892). And see Smith v. Leo, 92 Hun, 242, 36 N. Y. Supp. 949 (1895), theater ticket. The fact that by yielding to the unwarranted demand he would have avoided expulsion does not limit his damages to the amount of fare demanded. Pa. R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238 (1884); Lexington, etc., Ry. Co. v. Lyons, 104 Ky. 23, 46 S. W. 209 (1898); Yorton v. Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516 (1885); St. Louis, etc., Ry. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766 (1888). But it does not follow, even in the case of a common carrier, that such a passenger has a right to remain which survives his being ordered to leave, if the carrier has a regulation that persons without proper tickets must leave at request or pay fare. "If after this notice he waits for the application of force to remove him, he does so in his own wrong. He invites the use of the force necessary to remove him, and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another." Grover, J., in Townsend v. N. Y. C. R. Co., 56 N. Y. 295, 15 Am. Rep. 419 (1874). And see Wood v. Leadbitter, 13 M. & W. 838 (1845), race track ticket; McCrea v. Marsh, 12 Gray (Mass.) 211, 71 Am. Dec. 745 (1858), theater ticket.

Even if the passenger has a right to remain in the train so that forcibly ejecting him is a tort, it does not follow that he is entitled to defend his right by resisting a conductor acting in good faith, and recover damages for injuries incurred in resisting. "A train crowded with passengers, often women and children, is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise, and dangerous to the traveling public, to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a

demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for every indignity offered, and for all damages sustained." Craig, J., in Pa. R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238 (1884). Acc. Kiley v. Chicago City Ry. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460 (1901). And see Monnier v. N. Y. C. R. Co. (1903) post, p. 556. Contra: Ellsworth v. C., B. & Q. R. Co., 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173 (1895). And see Pine v. St. Paul City Ry. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347 (1892).

DAMAGED AND ALTERED TICKETS.—In the following cases tickets which without the holder's fault were in damaged or altered condition, but still capable of being recognized, were held good: Railroad Co. v. Conley, 6 Ind. App. 9, 32 N. E. 96 (1892), discolored; Wightman v. Chicago, etc., R. Co., 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778 (1888), coupon "not good if detached" accidentally separated; Young v. Central Ry. Co., 120 Ga. 25, 47 S. E. 556, 65 L. R. A. 436, 102 Am. St. Rep. 68 (1904), ticket "not good if mutilated" accidentally torn in two; Rouser v. No. Park St. Ry. Co., 97 Mich. 565, 56 N. W. 937 (1893), name of destination torn off by previous conductor.

Compare Louisville, etc., R. Co. v. Harris, 9 Lea (Tenn.) 180, 42 Am. Rep. 668 (1882), coupons "void if detached by any one but the conductor" detached by passenger in conductor's presence; Norfolk & W. R. Co. v. Wysor, 82 Va. 250 (1886), coupons "void if detached" torn from book by passenger in conductor's presence; B. & M. R. Co. v. Chipman, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293 (1888), coupon "not good if detached" presented alone; Henly v. Delaware, etc., R. Co., 28 Misc. Rep. 499, 59 N. Y. Supp. 857 (1899), commutation ticket cut down by passenger to fit his card case, so that ticket puncher punched fares inaccurately.

AGREEMENTS CONCERNING VALIDATION.—An agreement that a round trip ticket shall not be good for return passage unless stamped at destination by a designated person is valid. Boylan v. Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290 (1889). Even though such person is unable or unwilling to act. Mosher v. Railroad Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249 (1888); Western Md. R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880 (1896). But if a validating agent, who unwarrantably refuses to act is the carrier's employé, it has been held that the carrier cannot take advantage of the nonfulfillment of the condition. Head v. Ga. Pac. Ry. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434 (1887), agent refused to sign; No. Pac. R. Co. v. Pauson, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730 (1895), ticket unstamped by mistake; So. Ry. v. Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536 (1901), no agent on hand; Pittsburgh, etc., Ry. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816 (1906), passenger not allowed to furnish proof of identity. Contra: McGhee v. Reynolds, 117 Ala. 413, 23 South. 68 (1897), the only wrong is the refusal to validate.

# CHAPTER VII

# LIABILITY WHERE SEVERAL PERSONS ARE CONCERNED IN CARRIAGE

## SECTION 1.—WITH WHOM IS THE CONTRACT OF CARRIAGE

### CITIZENS' BANK v. NANTUCKET STEAMBOAT CO.

(Circuit Court, D. Massachusetts, 1841. 2 Story, 16, Fed. Cas. No. 2,730.)

Libel in admiralty. * * *

STORY, J.[1] * * * The suit is in substance brought to recover from the steamboat company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. * * *

The ground of the defense of the company is that, in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were, in fact, common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master, in receiving and transporting money and bank bills, acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the company or by their authority; that, in truth, he acted as a mere gratuitous bailee or mandatory on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defense against the present suit.[2] * * *

[1] The statement of facts and parts of the opinion are omitted.

[2] The decree of the District Court dismissing the libel was affirmed. Compare Cantling v. Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476 (1873), railroad held to be bailee of dog in charge of baggage master, who, as customary, kept as a perquisite the price charged.

## CUTLER v. WINSOR.

(Supreme Judicial Court of Massachusetts, 1828. 6 Pick. 335, 17 Am. Dec. 385.)

Assumpsit against the defendant as owner of the schooner Alexander, for certain goods laden on board of her by the plaintiffs at Boston, to be carried to Alexandria, she being then commanded by Jesse Snow.

The defense rested upon the ground that Snow was charterer of the vessel, and so constructive owner pro hac vice, when the goods were shipped; and to maintain it the defendant produced the deposition of Snow, originally taken on behalf of the plaintiffs, and to which was annexed the written agreement made between Snow and the defendant concerning the use of the vessel.

The material part of this agreement is as follows: "The said Capt. Snow, having agreed to take the said schooner Alexander for the purpose of getting employ in the freighting business, doth by these presents promise and oblige himself to victual and man the said schooner, and pay one-half of all port charges and pilotage, etc. And I, the said Winsor, do promise, on my part, to put said schooner in sufficient order for such business, with sails, rigging, and tackling; likewise to pay one-half of the port charges, pilotage, etc., together with eight dollars per month for one man's wages; and it is understood that all money or moneys so stocked in said schooner, whether for freight or passage or whatever, shall be equally divided between the said Capt. Snow and Winsor, each party accounting for the above." * * * A verdict was taken for the defendant, subject to the opinion of the whole court.

PARKER, C. J.[3] In the case of Reynolds v. Toppan, 15 Mass. 370, 8 Am. Dec. 110, it was determined that the owner of a vessel under charter, the hirer having the whole control of the vessel for the time, to victual and man her and pay over a portion of the net proceeds to the owner for the use of the vessel, was not liable to the shippers of goods on board the vessel, which had been embezzled or otherwise not accounted for by the master. In that case the English authorities cited on the present occasion were duly considered by the court and therefore will not be commented upon; and in the case of Taggard et al. v. Loring, 16 Mass. 336, 8 Am. Dec. 140, the same principle is recognized, and is applied to a contract of hire of the vessel which existed only in parol. So that the inquiry in the present case can be only whether there exist any circumstances which distinguish it from those which have been thus decided.

And first it is insisted that in the cases decided the letting the vessel was for a certain determinate period, in one case for six months, and

[3] The statement of facts has been abbreviated.

in the other for the season; whereas in the present case there is no provision for the duration or the termination of the contract.

It is not perceived that any difference in regard to the liability of the parties can result from this circumstance, for although the contract was determinable at the will of the owner of the vessel, yet, as in other contracts of a similar nature, this right is subject to the qualification that it could not be rescinded while the vessel was actually employed in business pursuant to the contract; so that it was an absolute and indefeasible hiring of the vessel for every voyage she should have undertaken until notice was given by the owner of his intention to discontinue it.

The principle of ownership pro hac vice by the hirer would apply to every voyage undertaken by him before he should receive notice from the owner that he chose to terminate the contract. For this we cite no authority, for no case like the present has been found; but it results from the nature of the contract and the rights of the party under it, and is analogous to the case of leases at will of real estate, which cannot be terminated but by mutual consent, unless the lessor gives reasonable notice to quit.

It is also thought that the clause in the agreement, which provides that the defendant, the owner, shall be accountable for the wages of one man at $8 per month, constitutes a substantial difference between this and the cases decided; but, on reflection, we consider this only as a means of ascertaining the charges upon the earnings before a division shall be made between the charterer and the owner. It is no more than if the parties had agreed that the earnings should be divided, except that $8 per month should be deducted from the defendant's share.

As to the question of copartnership between the defendant and Snow in the employment and earnings of the vessel, we think it cannot be predicated on the facts appearing in this case, any more than in all the cases in which the charter of the vessel was agreed to be paid by a portion of the earnings.

Judgment according to verdict.[4]

[4] Instances of charters of demise may be found in Colvin v. Newberry, 1 Cl. & F. 283 (1832); The Daniel Burns (D. C.) 52 Fed. 159 (1892); The Barnstable, 181 U. S. 464, 468, 21 Sup. Ct. 684, 45 L. Ed. 954 (1901); Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609 (1906). See, also, Pitkin v. Brainard, 5 Conn. 451, 13 Am. Dec. 79 (1825); The National City, 117 Fed. 822, 55 C. C. A. 44 (1902). In Drinkwater v. The Spartan, 1 Ware, 145, Fed. Cas. No. 4,085 (1828), Ware, J., said: "There are, however, two kinds of contracts passing under the general name of "charter party," differing from each other very widely in their nature, their provisions, and in their legal effects. In one, the owner lets the use of his ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact and in contemplation of law the carrier of whatever goods are conveyed in his ship. In

## MUSCHAMP v. LANCASTER & P. J. RY. CO.

(Court of Exchequer, 1841. 8 Mees. & W. 421.)

Case [for the loss of a box alleged to have been delivered to and received by the defendant as a common carrier to be conveyed for hire to the Wheatsheaf, Bartlow]. * * *

At the trial before Rolfe, B., at the last assizes at Liverpool, the following facts appeared in evidence: The defendants are the proprietors of the Lancaster & Preston Junction Railway, and carry on business on their line between Lancaster and Preston, as common carriers. At Preston the line joins the North Union Railway, which afterwards unites with the Liverpool & Manchester Railway at Parkside, and that with the Grand Junction Railway. The plaintiff, a stone mason living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff, "to be left at the Wheatsheaf, Bartlow, near Bakewell, Derbyshire" (a place about eight miles wide of the Birmingham & Derby Junction Railway), and requested the clerk at the station to book it. In answer to her inquiries, he told her that the box would go in two or three days; and on her asking whether it would go sooner if the carriage was paid in advance, he inquired whether any one was going with it; on her answering in the negative, and that the person for whom it was intended would be ready at the other end to receive it, he said the carriage had better be paid for by that person on the receipt of it. It appeared that the box arrived safely at Preston, but was lost after it was despatched from thence by the North Union Railway. Upon these facts the learned judge stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is prima facie evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. The jury found a verdict for the plaintiff, damages £16 1s.

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the other, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for a lease of the vessel."

Instances of charters under which the shipowner retained possession may be found in The Aberfoyle, Abb. Adm. 242, Fed. Cas. No. 16 (1848); Adams v. Homeyer, 45 Mo. 545, 100 Am. Dec. 391 (1870); The Craigallion (D. C.) 20 Fed. 747 (1884); Grimberg v. Columbia, etc., Ass'n, 47 Or. 257, 83 Pac. 194, 114 Am. St. Rep. 927 (1905). For the rights and liabilities of those who ship under an agreement with the charterer upon a vessel whose owner retains possession, see Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106 (1900); Wehner v. Dene S. S. Co., 2 K. B. 92 (1905); Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. Supp. 86 (1905); Id., 184 N. Y. 325, 77 N. E. 625 (1906).

In Easter term, Cresswell obtained a rule nisi for a new trial, on the ground of misdirection.

Martin now showed cause, and contended that there was no misdirection. * * *

Cresswell, Baines, and Burrell, in support of the rule. This is not the case of a conveyance traveling throughout a continuous line, like a coach, for instance, which professes to run from London to York; in such a case parties are not bound to look out for the particular proprietors interested in the different parts of the line. But there it is held out to the public as one line; this is the case of a company known as the Lancaster & Preston Junction Railway, and holding themselves out to the world as the proprietors of and carriers upon that distinct line of railway only. To hold them liable for the loss of a parcel beyond the limits of their own line would therefore be very unjust. Suppose the case of a known coach from London to Stamford, and a party delivers to the book-keeper a parcel directed to York, does that prove a contract to carry it to York? [Lord ABINGER, C. B. What would be the undertaking of the carrier in that case?] To carry to Stamford, and forward thence to York. Parties must be assumed to contract in reference to the known mode in which the carrier carries on his business. * * *

Lord ABINGER, C. B.[5] The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel that the defendants contract to do something more with the parcel than merely to carry it to Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and how much more was undertaken to be done by them? Now it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of

[5] Parts of the statement of facts and of the arguments of counsel are omitted.

the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway.

Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggests; namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against them.

But the question is, why should the jury infer one of these contracts rather than the other? which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum rather supports the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners inter se as to the carriage-money—a fact of which the owner of the goods could know nothing; as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine whether the contract was on the evidence before them. With respect to the case referred to, of the booking office in London, it only goes to show

that when persons take charge of parcels at such an office they merely make themselves agents to book for the stagecoaches. You go to the office and book a parcel; the effect of this is to make the booker your agent, instead of going to the coach office yourself; and so that he sends the parcel to the proper coach office, and once delivers it there, he has discharged himself; he has nothing to do with the carriage of the goods.

In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, prima facie, must be made, of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff; it is only prima facie evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind inter se, and should be taken each to have made the others their agents to carry forward.

GURNEY, B. I think there is no misdirection in this case, and that the jury might fairly infer that the contract was such as was stated by the learned judge. If the goods were to be carried only in the narrow sense contended for by the defendants, then, if the place of their destination were but three miles beyond Preston, and they were lost on the other side of the railway terminus, the defendants are not to be liable, but the plaintiff is to find out somebody or other who is to be liable in respect of the carriage for those three miles.

ROLFE, B. I am of the same opinion, and think the construction we are putting on the agreement is not only consistent with law, but is the only one consistent with common sense and the convenience of mankind. What I told the jury was only this, that if a party brings a parcel to a railway station, which in this respect is just the same as a coach office, knowing at the time that the company only carry to a particular place, and if the railway company receive and book it to another place to which it is directed, prima facie they undertake to carry it to that other place. That was my view at the trial, and nothing has occurred to alter my opinion.

As to the case which has been put, of a passenger injured on the line of railway beyond that where he was originally booked, I suppose it is put as a reductio ad absurdum; but I do not see the absurdity. If I book my place at Euston Square, and pay to be carried to York, and am injured by negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York. But, at all events, in the case of a parcel, any other construction would open the door to incalculable inconveniences. You book a parcel, and on its being lost, you are told that the carrier is responsible only for one portion of the line of road. What would be the answer of the owner of the

goods? "I know that I booked the parcel at the Golden Cross for Liverpool, and my contract with the carrier was to take it to Liverpool." All convenience is one way, and there is no authority the other way.

Rule discharged.[6]

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## MYRICK v. MICHIGAN CENT. R. CO.

(Supreme Court of the United States, 1882. 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.)

Action for breach of contract to carry cattle from Chicago to Philadelphia and there deliver to shipper's order. The defendant operated a railroad between Chicago and Detroit. Its line connected at Detroit with lines of other companies to Philadelphia. Plaintiff delivered cattle to the defendant for transportation and took a receipt which ran as follows:

Michigan Central Railroad Company,
Chicago Station, Nov. 7th, 1877.

Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. and W. Blaker, Philadelphia, Pa.):

| Articles. | Weight or Measure. |
|---|---|
| Two hundred and two (202) cattle | 240,000 |

Advance charges, $12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at

Wm. Geagan, Agent.

On the margin and back of the receipt were a printed notice and rules, the purport of which is stated in the opinion. Defendant carried the cattle to Detroit and there delivered them to a connecting carrier for transportation to Philadelphia. They were misdelivered at Philadelphia.

The plaintiff had a verdict and judgment. The case comes to this court on writ of error.[7]

[6] See this and later English cases reviewed in Gray v. Jackson, 51 N. H. 9, 12-23, 12 Am. Rep. 1 (1871).

"The proposition that there is evidence for the jury to consider is not identical with the proposition that the evidence, if believed, raises a presumption of fact. The proposition that there is evidence to be considered imports that there may be a presumption of fact. But generally it must be left to the jury to say whether there is one, and in many cases that is the main question which they have to decide." Holmes, J., in Commonwealth v. Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707 (1886).

[7] The statement of facts has been rewritten.

FIELD, J. The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusion reached.

A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in Railroad Company v. Manufacturing Company: "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall. 318, 324, 21 L. Ed. 297.

This doctrine was approved in the subsequent case of Railroad Company v. Pratt, although the contract there was to carry through the whole route. 22 Wall. 123, 22 L. Ed. 827. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See, also, Insurance Company v. Railroad Company, 104 U. S. 146, 26 L. Ed. 679.

The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense

that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not, on its face, import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says that it is consigned to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds, "Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ———," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "Notice.—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier; and that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of the goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common-law responsibility of carriers has no application. There is, as already stated, no common-law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common-law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station house at Chicago. Such notices are usually found

in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line.

It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is prima facie bound to carry them to that place and deliver them there, and that an agreement to that effect is implied by the reception of goods thus marked. Illinois Central Railroad Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Illinois Central Railroad Co. v. Johnson, 34 Ill. 389.

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298; Railroad Company v. National Bank, 102 U. S. 14, 26 L. Ed. 61; Hough v. Railway Company, 100 U. S. 213, 25 L. Ed. 612.

If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern, not only in Illinois, but in other states; and yet the tribunals of other states, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. Nutting v. Connecticut River Railroad Co., 1 Gray (Mass.) 502; Burroughs v. Norwich & Worcester Railroad Co., 100 Mass. 26, 1 Am. Rep. 78. If we are to follow on this

subject the ruling of the state courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place beyond the road of the company—in different states, holding it to imply one thing in Illinois and another in Massachusetts.

The judgment must be reversed, and the case remanded for a new trial; and it so ordered.[8]

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## CHICAGO & A. R. CO. v. MULFORD.

**(Supreme Court of Illinois, 1896. 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599.)**

CARTWRIGHT, J. Appellees recovered a judgment of $10,854.60 in the circuit court of Cook county in an action of assumpsit against appellant for the value of certain coupons for passage over the Lake Erie & Western Railway and the Ohio Central Railroad, attached to passenger tickets sold by appellant to appellees. From that judgment an appeal was taken by appellant to the Appellate Court, which affirmed the judgment.

The cause was tried before the court without a jury, and at the conclusion of the trial the defendant entered its motion to exclude the evidence for the plaintiffs. The motion was denied, and an exception taken. The motion was in the nature of a demurrer to the evidence, and that it was proper and in apt time is not questioned. It admitted all that the evidence proved or tended to prove on the part of the plaintiffs; but, if there was no evidence legally tending to prove a cause of action against the defendant, it should have been sustained. The undisputed evidence tended to prove the following facts:

Plaintiffs were railroad ticket brokers, having offices in various cities in the United States. In 1880, Mr. Mulford had charge of their office in Chicago, and Mr. McKenzie of the one in St. Louis. In the fall of that year there was what was called a "rate war," in which defendant was engaged; and tickets were being sold from Kansas City, Mo., to different points on the Lake Erie & Western Railway for one dollar. The Wabash Railway was selling tickets from Kansas City eastward at nominal rates, thereby taking traffic from the defendant, and also from the Lake Erie & Western. Anticipating that the rate war would soon end, the defendant desired in that event to be able to compete successfully with other companies, and decided to place large blocks of tickets on the market prior to the

[8] For cases acc. and contra, see 6 Cyc. 479; Carriers, 9 Cent. Dig. § 781, 4 Dec. Dig. §§ 172, 173; 106 Am. St. Rep. 604–612, note. The acceptance from an initial by an intermediate carrier of goods marked for a point beyond his line is not sufficient evidence of a contract to carry to destination. Chicago & N. W. R. Co. v. No. Line Packet Co., 70 Ill. 217 (1873).

anticipated advance of rates. Mr. Mulford was in Indianapolis for the purpose of establishing a ticket office there, when an agent of defendant called upon him, and proposed a sale of tickets from Kansas City east, stating that defendant would give plaintiffs rates through to Toledo and Sandusky so low that by adding the local rate they could make a through rate to New York or Boston that would be less than the regular through rate. Thereafter negotiations were carried on, the result of which was that plaintiffs purchased 2,500 tickets for the aggregate sum of $24,957.50, from Kansas City, over defendant's road, to Bloomington, and from that place over the Lake Erie & Western Railway, and a part of them also over the Ohio Central Railroad. These tickets were issued by the defendant under an agreement with the Lake Erie & Western Railway, and by authority from that road.

* * *

The rate war ended in the spring or summer of 1882. Plaintiffs sold the tickets to their customers, and they were received and honored by the respective roads until June 6, 1885, when, the Lake Erie & Western having been placed in the hands of a receiver, he was ordered by the United States court for the Southern district of Illinois, the district of Indiana, and the Northern district of Ohio, to refuse to accept for passage over the road any of the tickets in question. Plaintiffs had sold, prior to that time, about 1,181 tickets, and had on hand about 1,319. After the refusal of the receiver of the Lake Erie & Western Railway to honor the tickets, the coupons for that road became worthless, and those for the Ohio Central could not be used because they were first in order, being attached at the head of the ticket.

* * *

The question raised by the motion is whether these facts rendered through tickets in the form of coupons which are purchased of the receiver of the Lake Erie & Western to perform the contract. In the English courts it is held that the sale of a ticket by a railroad company over its own and connecting lines is evidence of a contract for through carriage to the destination; and that the company making the sale thereby enters into a contract that renders itself liable for the full journey. In this country the decisions are not harmonious; but the general rule is stated in the American & English Encyclopedia of Law (volume 25, p. 1085) as follows: "But the doctrine founded in reason, and best supported by the authorities in this country, is that, in the absence of a contract making it responsible, the carrier selling the tickets acts merely as the agent of the other lines, and there is no extra terminal liability; the rights of the passenger, and the duties and responsibilities of the several companies over whose roads he is entitled to passage, being the same as if he had purchased a ticket at the office of each company constituting the through line."

The rule is also stated in 2 Redf. R. R. § 201, as follows: "These through tickets in the form of coupons which are purchased of the

first company, and which entitle the persons holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles, in this country, import commonly no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company, as agent for the others, so far as the passenger is concerned," etc. This rule has been adopted by this court. Railroad Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Railroad Co. v. Dumser, 161 Ill. 190, 43 N. E. 698.

It is insisted that this court, in the case of Railroad Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749, held that a railroad company selling through tickets over its own and other roads became responsible for the carriage of the passenger to the end of the route. That was a suit for the value of the baggage lost, which was checked by the railroad company from Chicago to St. Louis. A brass check was given for the trunk deliverable at St. Louis, and the company giving the check was held liable. In the subsequent case of Railroad Co. v. Fahey, 52 Ill. 81, 4 Am. Rep. 587, where a ticket was given for passage over several roads, it was held that the company that lost the baggage would be liable, and that the recognition of the ticket was a recognition of the agency of the road that sold it. In that case the rule as now existing with reference to passengers was recognized with regard to baggage.

But a distinction has been made between the liability in the case of baggage and of passengers, and the liability for the loss of baggage has sometimes been held to be the same as in other cases of the carriage of goods. 2 Redf. R. R. § 201. And there may be reasonable grounds for such a distinction, although the carriage of the baggage is merely incident to that of the passenger. In such cases the railroad company takes the baggage into its own possession and control, and a check is given which may be regarded as a single contract on the part of the company to deliver the goods at the place of destination. Besides, necessity might require such a rule, since any other would impose upon the passenger the necessity of looking after his baggage, and examining it at each change from one road to another. It would often be practically impossible to do that, or to prove where or by whose negligence the loss occurred.

It is not necessary, in this case, to determine what the rule would be in respect to a loss of baggage, as it is not involved. But it is settled what the contract is in the case of passengers, and, if it is otherwise in the case of baggage, it rests upon some distinction arising out of the nature of the different contracts. If, then, the defendant could be held liable as principal, it must be because of some contract other than that arising from the mere sale of tickets. The only thing outside of the tickets themselves upon which any claim is based that there was a contract by defendant for carriage over the other

roads consists in the statement made in Indianapolis by the agent of defendant, and given above. This was offered as an inducement to the plaintiffs to buy the tickets, but it had no tendency to alter the contract implied by the law. There was nothing in the statement as to defendant being principal or agent in the transaction, and nothing which could lead plaintiff to suppose that the contract was other than the law would imply. The cheapness of the tickets could not even raise a supposition as to the character in which they were issued or sold. Whatever the price may have been, the plaintiffs knew that the tickets, when issued, would have coupons; and the last one, to be first taken off, would read over the Chicago & Alton, and the next over the Lake Erie & Western, and a part of them would also have coupons over the Ohio Central. They admittedly knew that the Lake Erie & Western Railway was an independent line, starting from Bloomington and going to Muncie, Ind., as testified; and that it was not run or managed by the defendant.

But it is said that the tickets themselves were such as to render the defendant liable. On the heading of the tickets was the following: "Issued by Chicago & Alton R. R. Good for one first-class passage to station stamped in margin of attached coupon." And it is urged that this makes the ticket a contract to transport the holder over the Lake Erie & Western. The coupons for passage over the Lake Erie & Western contained the following: "Issued by Chicago & Alton R. R. —Lake Erie & Western R. R." At the bottom of the coupon was the following: "Via C. & A., L. E. & W." On the coupons for passage over the Ohio Central Railroad there was: "Issued by Chicago & Alton R. R. & Ohio Central Railroad;" and on the bottom of the coupons: "Via C. & A., L. E. & W., O. C." The statement on the tickets and coupons, "Issued by the Chicago & Alton Railroad," added nothing to the fact. They were so issued to the knowledge of all the parties, and the statement did not tend to show in any manner in what capacity they were so issued. We do not see how the statement, "Good for one first-class passage," affected the contract. Ordinarily, a ticket is a mere token or voucher. Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; Railroad Co. v. Dumser, supra. It is necessary in any ticket to show what it is for. These tickets were issued for first-class passage from Kansas City to the designated station, and this clause was placed on the tickets to indicate for what purpose they were intended to be used. There were, in addition, the names of the connecting railroads upon the coupons, showing over what roads they were good; and there was nothing upon the tickets regarding the contract which could change the rule or presumption of law. * * *

It is urged, however, that the defendant is liable under the rule of law stated, although it incurred no extra terminal responsibility by the sale of tickets. The claim under this head is that defendant under-

took, in a sale of the tickets, that they should be recognized and honored by the Lake Erie & Western Railway Company as good for transportation over its line. The only way in which the Lake Erie & Western Railway Company could recognize and honor the tickets was by carrying the passengers; in other words, by performing the contract. And this would be making an agent responsible that his principal should recognize the agency and carry out the contract. That is not the liability of an agent. An agent does impliedly contract that he is an agent, and has authority to do the act. But in this case there is no question that such was the fact. * * * That defendant might have made a contract for the carriage of passengers over the entire line, where its road was a part of the route, is not doubted; but the evidence did not tend to prove that any such contract had been made.

It is suggested that the defendant might be liable on the ground of a partnership between it and the Lake Erie & Western. But the evidence does not tend to prove partnership. The fact that each road sells through tickets, taking its own share of the price according to its mileage, does not constitute them partners. 25 Am. & Eng. Enc. Law, p. 1087. And corporations cannot enter into partnership with each other. Bishop v. Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317.

There were other questions in the case, but, as there was no evidence tending to prove any contract different from that implied by law, the conclusion that defendant was not liable cannot be escaped, and the motion of the defendant should have been sustained. The judgments of the appellate and circuit courts will be reversed, and the cause remanded. Reversed and remanded.*

* Parts of the opinion are omitted.

Acc. Hartan v. Eastern R. Co., 114 Mass. 44 (1873). Compare Chicago & Alton R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698 (1896); Pa. Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 179, 106 Am. St. Rep. 597 (1905), tickets bought in reliance on advertisement of through trip; Hutchins v. Pa. R. Co., 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537 (1905), ticket issued in response to request for through transportation; Talcott v. Wabash R. Co., 159 N. Y. 461, 54 N. E. 1 (1899), sample trunk checked through on payment of excess baggage charge; held on second trial, not a through contract, 109 App. Div. 491, 96 N. Y. Supp. 548, affirmed 188 N. Y. 608, 81 N. E. 1176 (1907); Cherry v. Kansas City, etc., Ry. Co., 61 Mo. App. 303 (1895), ticket containing no reference to connecting carrier; Central R. Co. v. Combs, 70 Ga. 533, 48 Am. Rep. 582 (1883).

In Atchison, etc., R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199 (1886), Johnston, J., said: "But where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket and the checking of the baggage for the whole distance is some evidence of an undertaking to carry the passenger and baggage to the end of the journey."

And see Kansas City, etc., R. Co. v. Washington, 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. Rep. 61 (1905).

## BLOCK v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, 1885. 139 Mass. 308, 1 N. E. 348.)

Contract, against the Fitchburg Railroad Company and seven other railroad corporations, described in the writ as "doing business together as a line for the purpose of carrying freight, under the name of 'Erie & North Shore Despatch,'" and having a usual place of business in Boston. * * * Trial in the superior court before Staples, J., who ordered a verdict for the defendants. The plaintiff alleged exceptions, which appear in the opinion.

MORTON, C. J.[10] The evidence at the trial tended to show that the several defendant corporations formed an association or company, under the name of "The Erie & North Shore Despatch," for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston who was authorized to receive goods at Boston for transportation over the line to Chicago, and to give bills of lading or contracts for transportation like the one upon which the plaintiff sues; that the plaintiff delivered goods to such agent, and received the bill of lading in suit; and that a part of the goods were lost between Boston and Chicago. By the bill of lading, "The Erie & North Shore Despatch" contracts to carry the goods from Boston by the Fitchburg Railroad, and thence by the Erie & North Shore Despatch to Chicago, and there to deliver them to connecting railroad lines to be forwarded to Denver, their destination. The several railroad companies which form the association are not named in the contract. It is a single and indivisible contract, by which the Erie & North Shore Despatch Line agrees to carry the goods to Chicago, the freight to be earned upon the delivery there to the connecting line. So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. Darling v. Boston & W. R. Co., 11 Allen, 295; Gass v. New York, P. & B. R. Co., 99 Mass. 220, 96 Am. Dec. 742; Burroughs v. Norwich & W. R. Co., 100 Mass. 26, 1 Am. Rep. 78; Aigen v. Boston & M. R., 132 Mass. 423.

The defendants formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned, partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract. * * *

Exceptions sustained.[11]

[10] Parts of the statement of facts and of the opinion are omitted.

[11] See, also, Swift v. Pacific Mail S. S. Co., 106 N. Y. 206, 12 N. E. 583 (1887); Peterson v. Chicago, etc., Ry. Co., 80 Iowa, 92, 45 N. W. 573 (1890).

## SECTION 2.—DELEGATION OF CARRIER'S DUTY.

### I. LIABILITY OF THE CARRIER WHO DELEGATES

### BUCKLAND v. ADAMS EXPRESS CO.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 124, 93 Am. Dec. 68.)

See ante, p. 19, for a report of the case.

### HEGEMAN v. WESTERN R. CORPORATION.

(Court of Appeals of New York, 1855. 13 N. Y. 9, 64 Am. Dec. 517.)

The action was brought to recover damages for injuries to the person of the plaintiff, alleged to have been caused by the negligence of the defendant. The cause was tried at the Rensselaer county circuit, held by Justice Wm. F. Allen, in October, 1852. The plaintiff proved that the defendant was the proprietor of a railroad extending from Greenbush to Boston; that in September, 1850, the plaintiff was a passenger on the railroad, having taken the train at Greenbush for Boston, and when near Hinsdale, Mass., an axle of the car in which he was riding broke, and three of the passengers in the car were killed and the plaintiff was seriously and permanently injured. * * * The jury returned a verdict in favor of the plaintiff, and assessed his damages at $9,900. * * * The defendant appealed to this court. * * *

GARDINER, C. J.[12] * * * Two questions were presented for the consideration of the jury. First, was there a test known to and used by others, and which should have been known to a skillful manufacturer, by which the concealed defect in the axle of the car could have been detected; and if so, then, secondly, was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which the jury have found. * * *

It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the "utmost care and skill in its preparation." They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well directed skill can do

[12] Parts of the statement of facts and of the opinion are omitted.

has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public. * * * The judgment of the Supreme Court should be affirmed.[18]

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## THORPE v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1879. 76 N. Y. 402, 32 Am. Rep. 325.)

ANDREWS, J.[14] The defendant's counsel, upon the conclusion of the evidence, moved for a nonsuit, on the ground that the porter, by whom the alleged assault was committed, was not the servant of the defendant, and that the defendant was not therefore responsible for his acts.

[18] Contra, Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321 (1878). And see Nashville, etc., R. Co. v. Jones, 9 Heisk. (Tenn.) 28 (1871).

In Marney v. Scott, [1899] 1 Q. B. 986, an action by a longshoreman against the charterer of a ship for injury received by reason of the defective condition of a fixed ladder leading to the hold, Bigham, J., said: "I think that a man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested owes a duty to those who do so come to use reasonable care to see that the property and the appliances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him. If the parties with whom he so contracts fail to use reasonable care and damage results, the occupier still remains liable. * * * The effect of the authorities is correctly and clearly stated in Pollock on Torts (5th Ed.) at page 477: 'The duty is founded not on ownership, but on possession—in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so.' And on page 482: 'The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or stagings in a dock * * * to a temporary stand * * * to carriages traveling on a railway or road * * * to ships.'"

Acc. Hyman v. Nye, [1881] 6 Q. B. D. 685, carriage with driver hired at livery stable.

A railroad company is liable to a passenger for injury caused by a defect in a bridge or embankment due to neglect of the contractor who built it. Grote v. Chester, etc., Ry. Co., 2 Ex. 251 (1848); Philadelphia, etc., R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787 (1880). Or for the defective condition of a station or of tracks which it uses, though under the control of another company. Peniston v. Chicago, etc., R. Co., 34 La. Ann. 777, 44 Am. Rep. 444 (1882); Buxton v. N. E. Ry. Co., L. R. 3 Q. B. 549 (1868).

[14] Part of the opinion is omitted.

The plaintiff was a passenger on the defendant's train. He entered the cars at Syracuse, with the intention of riding in one of the ordinary cars to Auburn. He passed through the two ordinary cars attached to the train, and finding no vacant seat passed into the drawing room car, and when called upon by the porter to pay the extra charge for a seat in that car, declined to pay the sum demanded, for the reason that he could find no seat elsewhere, but expressed a willingness to leave the car, whenever he could get a seat in the other cars. The porter thereupon attempted to eject the plaintiff from the car, and for this assault the action is brought.

The proof shows that all the seats in the two ordinary cars were occupied, and that several persons were compelled to stand in the passageway, and others were seated on the woodbox, for want of other accommodation. The ground upon which the motion for nonsuit was made assumes that, under the circumstances, the plaintiff was justified in going into the drawing room car, and that the act of the porter, in attempting to eject him, was an unjustifiable assault, but the claim is made, and the exception to the refusal to nonsuit is sought to be supported, on the ground that the porter was the servant of Wagner, the owner of the drawing room car, and was not, in fact or law, the servant of the defendant.

If the right of the plaintiff to maintain this action depends upon the existence of the conventional relation of master and servant, between the defendant and the porter at the time of the transaction in question, the action cannot be maintained. The porter was in fact the servant of Wagner. Wagner employed him, paid him, and could at any time discharge him. His duty was to take charge of the drawing room car on the train, assign seats to passengers desiring seats therein, and collect and receive the sums charged therefor. He was instructed by Wagner to remove from the car persons who refused to pay the extra fare, and looking at the contract of employment only, he was, in attempting to remove the plaintiff, acting as Wagner's servant.

The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrongdoer and the person sought to be charged. * * *

The business of running drawing room cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business is an invitation by the company to the public to use them, upon the

condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons, under which this part of the business is conducted, and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing room cars are its servants. Otherwise there would be two separate contracts in the case of each passenger in these cars, one with the company, and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing room car who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping car, injured by the porter's negligence. Is the passenger, in these or other similar cases which might be supposed, to be turned over, for his remedy, against Wagner, on the ground that the servant who caused the injury was his servant, and not the defendant's? The public interest, and due protection to the rights of passengers, require that the railroad company which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation. * * *

Judgment affirmed.[15]

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## PHELPS v. WINDSOR STEAMBOAT CO.

(Supreme Court of North Carolina, 1902. 131 N. C. 12, 42 S. E. 335.)

CLARK, J. This is an action against the defendant steamboat company, alleging that, while plaintiff was a passenger on one of its boats, by negligence in the loading and operation thereof the boat

[15] Acc. Pa. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141 (1880), defective condition of Pullman car and negligent conduct of porter; Airey v. Pullman Co., 50 La. Ann. 648, 23 South. 512 (1898), railroad company liable for porter's failure to awaken passenger in time to get out at destination: New York, etc., R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722 (1900), failure of refrigerator car company to ice car; Louisville & N. R. Co. v. Church, 155 Ala. 329, 46 South. 457 (1908), carelessness of porter in handling table; also cases in 4 Dec. Dig. Carriers, § 414.

A carrier by railroad is liable for negligence in the conduct of its transportation, though the negligent person is a servant of a connecting railroad. McElroy v. Nashua, etc., R. Corp., 4 Cush. (Mass.) 400, 50 Am. Dec. 794 (1849). If it permits another company to use its tracks, it is liable to its own passengers for injury caused by the negligence of that company in running its trains. Railroad Co. v. Barron, 5 Wall. 90, 18 L. Ed. 591 (1866). So if it runs its trains over the track of another company. Thomas v. Rhymney Ry. Co., L. R. 6 Q. B. 266 (1871); Wabash, etc., Ry. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705 (1883). Contra: Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424 (1857). See Am. Ex. Co. v. Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023 (1904), express company liable for injury by railroad's negligence to drover accompanying shipment of cattle.

was capsized, and the plaintiff was thrown into the water and injured, and her baggage was also damaged. The plaintiff joins in the action the administratrix of one John W. Branning, upon the ground that said Branning was the owner of said vessel, and had leased it to the said steamboat company. It does not appear, nor is it alleged, that he had any connection with the operation of said vessel by the other defendant.

His honor properly dismissed the action as to Branning upon the ground that no cause of action is stated against him. Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981; Shear. & R. Neg. § 501. In Harden v. Railroad Co., 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and the cases there cited, from Aycock v. Railroad Co., 89 N. C. 321, down to and inclusive of Perry v. Railroad Co., 129 N. C. 333, 40 S. E. 191, and City of Raleigh v. North Carolina R. Co., 129 N. C. 265, 40 S. E. 2 (affirmed since in Smith v. Railroad Co., 130 N. C. 344, 42 S. E. 139), the lessor is held liable, notwithstanding the lease, because a railroad company (the lessor in those cases) was a quasi public corporation, enjoying the use of the right of eminent domain to take private property by condemnation for its right of way "because it is for a public use," and with many other special privileges and rights conferred for the public benefit, and it could not be allowed, by merely making a lease, to put off all liability for the manner in which its duties are discharged, while receiving the full benefit for valuable privileges conferred upon it in the shape of rental.[16]

This can only be done, as the authorities cited in those cases show, when the legislative power, having had opportunity to look into the solvency of the lessee, has not only authorized the lease, but has expressly released the lessor company from further responsibility. Logan v. Railroad Co., 116 N. C. 940, 21 S. E. 959; Anderson v. Railroad Co., 161 Mo. 411, 61 S. W. 874; and numerous other cases cited in Harden v. Railroad Co., supra.[17] Were it otherwise, an insolvent lessee could operate the railroad without responsibility to the public or to employés, leaving the lessor, the original corporation, to enjoy the profits of its privileges without any corresponding responsibility in return.

[16] Where a railroad company without legislative authority has permitted its franchises to be exercised by a lessee, it has frequently been held liable for bodily injury attributable to negligence of the lessee in the operation of the road whether the person injured is a passenger, Chicago, etc., R. Co. v. Newell, 212 Ill. 332, 72 N. E. 416 (1904); or a stranger, Muntz v. Algiers, etc., Co., 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495 (1903); or, in some states, an employé. Chicago & G. T. Ry. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75 (1904). It has been held liable for the lessee's refusal to carry goods. Central, etc., Ry. Co. v. Morris, 68 Tex. 49, 3 S. W. 457 (1887). And for misdelivery. Nat. Bk. v. Atlanta, etc., Ry. Co., 25 S. C. 216 (1886); Ga. R. Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327 (1906), statutory. See 58 Am. St. Rep. 147, note.

[17] Acc. Chicago, etc., Ry. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75 (1904). Contra: Moorshead v. United Rys. Co., 203 Mo. 121, 136–138, 158–164, 96 S. W. 261, 100 S. W. 611 (1907), and cases cited.

But nothing in those cases, nor in the reason of the thing, applies to the lessor of a steamboat which has received no special privileges or benefits of great value from the state, and who indeed in this instance was a private individual. No liability attaches to said Branning because he was president of said company, unless it were alleged and shown that the lease was collusive and colorable only, and a sham to avoid personal liability, and that he had in fact leased his own property to himself. But, there is no such averment, and in dismissing the action as against his estate, there was no error.

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## BELL v. INDIANAPOLIS, C. & L. R. CO.

(Supreme Court of Indiana, 1876. 53 Ind. 57.)

DOWNEY, C. J.[18] Suit by the appellant against the appellee for injuries received by him in being run over by a train of cars of the defendant, on or about the 7th day of October, 1872. * * *

The only question on appeal to this court is as to the sufficiency of the first paragraph of the answer. [This paragraph had been held good on demurrer.] * * * The substance of the paragraph is that, at the time when the injury was inflicted upon the plaintiff, the railroad, etc., were in the hands and under the control of receivers duly appointed and acting. Is this a sufficient reason why the corporation shall not be held liable for the injury done the plaintiff? Counsel for appellee cite and rely upon Ohio & Miss. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477. The authority seems to us to be decisive of the question, and to sustain the ruling of the court below. * * *

The judgment is affirmed, with costs.[19]

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### II. LIABILITY OF THE PERSON DELEGATED

## PACKARD v. TAYLOR.

(Supreme Court of Arkansas, 1880. 35 Ark. 402, 37 Am. Rep. 27.)

EAKIN, J.[20] Taylor, Cleveland & Co., merchants at Pine Bluff, brought this action at law against appellants, Packard & Hammett,

[18] Parts of the opinion are omitted.

[19] Compare Grand Tower Co. v. Ullman, 89 Ill. 244 (1878), railroad operated by trustees for bondholders.

For the liability of a receiver as a common carrier, see Nichols v. Smith, 115 Mass. 332 (1874); McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 (1891). For the railroad's liability after the receiver's discharge, see Texas & P. R. Co. v. Huffman, 83 Tex. 286, 18 S. W. 741 (1892).

[20] Part of the opinion is omitted.

owners of the steamboat Lizzie, to charge them for damages to goods which had been delivered to said steamer at Little Rock, to be transported to Pine Bluff, and which had been injured by the sinking of the steamer in the Arkansas river, before her departure from the wharf. Bills of particulars, describing the goods were filed, and the damage sustained, sufficiently proved.

The defenses set up by the answer may be reduced to three:

1. That there was a nonjoinder of proper parties defendant, inasmuch as a third party not sued was a third owner of the vessel. This may be disposed of, at once, in passing.

Although independently of any statute, it was necessary to sue all the joint owners of a vessel on any contract made respecting it, and a nonjoinder was matter in abatement, yet this has been positively altered by the Code. See Gantt's Digest, §§ 4479 and 4480. Any or all may now be sued.

2. That defendants made no contract with plaintiffs for the carriage of the goods, but received them from the St. Louis & Iron Mountain Railroad Company, to be carried in its behalf, and to which, alone, they are responsible.

3. That defendants were guilty of no negligence, nor misconduct, but that the accident happened solely from the act of God, and the perils of the river.

Upon trial by a jury, there was a verdict for $750 damages, and judgment in plaintiffs' favor accordingly. There was a motion for a new trial, which was overruled. A bill of exceptions was taken, and an appeal granted. * * *

It will be seen that a portion of the objections to the instructions given for plaintiffs, and some of the instructions asked by defendants and refused by the court, are based upon this assumed principle, that if the defendants were acting only under a contract with the railroad to carry, for the corporation, freights which it had undertaken to deliver at Pine Bluff, they could only be held to answer at the suit of the railroad, and not of the plaintiffs.

But it must not be lost sight of, that defendants were, themselves, common carriers between Little Rock and Pine Bluff, carrying for the railroad only as a part of their general business. The contract had only the effect of a contract between common carriers, for increase of custom to the steamboat line, securing it, in competition with other carriers upon the same route. It did not relieve the steamboat owners from any of the general responsibilities of common carriers with regard to goods so transferred to them for carriage by the railroad. They were not the private agents of the railroad company, but were carrying on a general business, for the benefit of any one who might employ them. They are bound by the same obligations and to the same persons which bind successive common carriers, receiving goods from each other and transmitting them along the route to the point of ultimate destination. There were no bills of lading in this case,

restricting or defining the several liabilities of the railroad and the steamer Lizzie. The general law must govern.

The carrier's obligation to keep and carry safely is founded on the custom of the realm, at common law, and is independent of contract, being imposed by law for the protection of the owner, and founded upon public policy and commercial necessity. Chitty on Carriers, 34, 35. There may be a special contract, also, not indeed superseding that implied by law, which still underlies the other, but restricting or modifying it in some particulars, in a manner which the courts may not consider unreasonable, or subversive of the general policy. Id. But in the absence of any such contract, the carrier is an insurer—liable not only for negligence, but even for inevitable accident, not occasioned by act of God. In this case there is no question of public enemies.

We are cited to the cases of Bank of Kentucky v. Adams Express Co. (1876) 93 U. S. 174, 23 L. Ed. 872, and Newell v. Smith (1876) 49 Vt. 255, as authority to sustain the position that, the contract of affreightment being with the railroad, the defendants cannot be sued upon it. The first was a suit against an express company to recover the value of a package of money which defendant had received, to be delivered to plaintiff, at Louisville. The express company had employed the services of a railroad to transport its packages, which were accompanied by and remained under the control of its messenger. An accident happened to the road, by which the car was burned and the package destroyed. The defense set up was that the express company, having contracted to be held only to the liability of a common bailee for hire in case of loss by fire, was not answerable for the negligence of the employés of the railroad, over which it had no control; and so it was held by the Circuit Court. This was reversed, on appeal to the Supreme Court of the United States; the latter tribunal holding that the railroad company was the agent of the express company, and that the latter must answer for the negligence of the former. The question of the liability of the railroad company to the consignees of the package would be analogous to this, but it did not arise. The court, however, arguendo, took this liability for granted, upon the authority of New Jersey Steam Navigation Co. v. Merchants' Bank (1848) 6 How. 344, 12 L. Ed. 465, and say: "Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and defendants. They must claim through that. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company[21] and to the plaintiffs." 93 U. S. 184, 23 L. Ed. 872.

[21] See Powhatan Steamboat Co. v. Appomattox R. Co., 24 How. 247, 16 L. Ed. 682 (1860); Vermont & Mass. R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785 (1867); Little v. B. & M. R. R., 66 Me. 239 (1876).

In the case here before us, the goods were taken by the St. Louis, Iron Mountain & Southern Railway Company, without any express contract, to be carried to Pine Bluff, and were delivered to the defendants at Little Rock, as common carriers, to be transported to their destination, without any stipulation for exemption from the ordinary liability of carriers. According to the principle above announced, the owners of the Lizzie would thus become insurers, both to the St. Louis, Iron Mountain & Southern Railway Company, and to the plaintiffs. It is true, however, that in 93 U. S. 184, 23 L. Ed. 872, the case is stated hypothetically.

The case in 49 Vt. 255, supra, goes only to fix the liabilities of a carrier who expressly contracts to deliver goods at a destination beyond the terminus of his own road for the negligence of any connecting road in the line of transportation.

This court has held that this liability for loss by a connecting carrier may be repelled by express stipulation. Taylor v. Little Rock, M. R. & T. Railroad Co. (1877) 32 Ark. 393, 29 Am. Rep. 1. But neither the latter case nor the case from Vermont conflicts with the principle announced in 6 How. 344, 12 L. Ed. 465, supra, that the consignee of goods may maintain an action against the carrier in whose hands the loss happens, through the rights of the carrier originally bound.

Although the English courts have adopted the principle that a carrier who receives goods to be conveyed to a point beyond the terminus of his own route, is liable for losses whilst in the hands of connecting carriers, and have even held that in such cases the subsequent carrier cannot be held liable by the owner, yet the American courts have taken a different view. See the question discussed and authorities cited in Redfield on Railways, § 162, and notes.

I have not met with any American case absolving the connecting carrier from liability to the consignee, although the contract may have been made with a preceding one on the route.

There are some cases which hold the connecting carriers entitled to all exemptions and qualifications which the original carrier had secured for itself by special contract, thus limiting its common-law liability.[22] Such was the case of Manhattan Oil Co. v. Camden & Amboy R. R. (1868) 52 Barb. (N. Y.) 72; but they go no further. Even in England the principle seems confined to cases where the first company has expressly contracted to deliver at the point of destination; and some learned judges reject it altogether. Redfield, supra.

* * *

Affirm.[23]

[22] See Mears v. N. Y., etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192 (1902); Pittsburg, etc., Ry. Co. v. Viers, 113 Ky. 526, 68 S. W. 469 (1902); Kiff v. Atchison R. Co., 32 Kan. 263, 4 Pac. 401 (1884). Compare Babcock v. Lake Shore R. Co., 49 N. Y. 491 (1872).

[23] See, also, Halliday v. St. Louis, etc., Ry. Co., 74 Mo. 159, 41 Am. Rep. 309 (1881); U. S. Mail Line Co. v. Carrollton, etc., Co., 101 Ky. 658, 42 S. W. 342 (1897); Schopman v. Boston & W. R. Corp., 9 Cush. (Mass.) 24, 29, 55 Am. Dec.

## SECTION 3.—PRESUMPTION AS TO CIRCUMSTANCES OF DAMAGE

### MOORE v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298.)

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tenn., to Boston. The passage was over six connecting railroads. It does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called "presumption" was started and justified as a true presumption of fact that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it. 1 Greenl. Ev. § 79; Pub. St. c. 214, § 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (Farmington Mercantile Co. v. Chicago, B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131), it is almost necessary to call on the last carrier to explain the loss if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists. Smith v. Railroad Co., 43 Barb. (N. Y.) 225, 228, 229, affirmed in 41 N. Y. 620; Laughlin v. Railway Co., 28 Wis. 204, 9 Am. Rep. 493; Railroad Co. v. Holloway, 9 Baxt. (Tenn.) 188, 191; Dixon v. Railroad Co., 74 N. C. 538; Leo v. Railway Co., 30 Minn. 438, 15 N. W. 872; Railway Co. v. Culver, 75 Ala. 587, 593, 51 Am. Rep. 483; Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800, 7 L. R.

41 (1851), connecting railroad held liable as a common carrier to through passenger, with which compare Keep v. Union, etc., Co. (C. C.) 9 Fed. 625 (1881), where a terminal company drawing a train to the station was held not liable as a common carrier to a through passenger.

Contra: So. Ex. Co. v. Shea, 38 Ga. 519 (1868), changed by statute; Mytton v. Midland Ry. Co., 4 H. & N. 615 (1859); Coxon v. Gt. Western Ry. Co., 5 H. & N. 274 (1860).

For damage not shown to have occurred upon its line, a carrier like that in the principal case is not liable to the shipper. Aigen v. B. & M. R., 132 Mass. 423 (1882). Though it has agreed with the initial carrier to divide damage that cannot be traced. Ches. & Ohio R. Co. v. Stock, 104 Va. 97, 51 S. E. 161 (1905).

A. 280, 18 Am. St. Rep. 381; Railway Co. v. Harris, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; Faison v. Railway Co., 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577; Forrester v. Railroad Co., 92 Ga. 699, 19 N. E. 811.

In the opinion of the court the weight of argument and authority is on that side. Mr. Justice LATHROP and I have not been able to free our minds from doubt, because we are not fully satisfied that the court has not committed itself to a different doctrine. Still it has not dealt with it in terms. In Darling v. Railroad Corp., 11 Allen, 295, the only question discussed was a question of contract. In Swetland v. Railroad Co., 102 Mass. 276, the question was as to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases.

Judgment for the plaintiff.[24]

[24] See, further, 101 Am. St. Rep. 392, note; Smith v. N. Y. Cent. R. Co., 43 Barb. (N. Y.) 225 (1864); Laughlin v. Chicago & N. W. Ry. Co., 28 Wis. 204, 9 Am. Rep. 493 (1871), boxes rifled; Gulf, etc., Ry. Co. v. Jones, 1 Ind. Ter. 354, 37 S. W. 208 (1896), carrier liable by bill of lading only for damage proved to have happened on its own line; Willett v. So. Ry. Co., 66 S. C. 477, 45 S. E. 93 (1903), first carrier a city expressman.

Contra: Rolfe v. Lake Shore, etc., Ry. Co., 144 Mich. 169, 107 N. W. 899, 115 Am. St. Rep. 388 (1906).

The presumption does not arise unless there is proof of the condition of the goods when shipped. In Lake Erie & W. Ry. Co. v. Oakes, 11 Ill. App. 489 (1882), McCulloch, J., said: "It devolves upon the plaintiff to show by a preponderance of evidence that the goods were injured while in defendant's hands. * * * But it is not shown by the evidence over what road they were first shipped, nor in what condition they were when delivered to that road. The only evidence touching their condition is that furnished by the wife of appellee, who testifies they were in good condition when packed at her house before shipment. This is too remote. To charge appellant in any event it must at least appear they were in good condition when delivered to the first carrier on the route."

The presumption does not arise unless there is proof that the shipment came into the defendant carrier's possession. Kessler v. N. Y. C. R. Co., 61 N. Y. 538 (1875); Atchison, etc., Co. v. Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199 (1886). But if a carrier delivers only part of a shipment, the presumption is that the loss of the rest occurred on his line. Faison v. Ala., etc., Ry. Co., 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577 (1891); Gwyn Harper Co. v. Carolina R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675 (1901); St. Louis S. W. Ry. Co. v. Birdwell, 72 Ark. 502, 82 S. W. 835 (1904). It does not relieve the last carrier to show that part of the loss or damage occurred before the goods came to him, without showing what part. Railway Co. v. Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144 (1896). The presumption may be invoked against any carrier in the series in whose hands the goods are shown to have been in damaged condition. Gulf, etc., Ry. Co. v. Pitts, 37 Tex. Civ. App. 212, 83 S. W. 727 (1904). Or, it has been held, in sound condition. Meredith v. R. Co., 137 N. C. 478, 50 S. E. 1 (1905), and cases there cited.

In some states the presumption against the last carrier is by statute made under certain circumstances conclusive.

See So. Ry. Co. v. Waters, 125 Ga. 520, 54 S. E. 620 (1906); Vincent v. Yazoo, etc., Ry. Co., 114 La. 1021, 38 South. 816 (1905); Russell v. Mobile & O. R. Co., 87 Miss. 806, 40 South. 1015 (1906); Willett v. So. Ry. Co., 66 S. C. 477, 45 S. E. 93 (1903); Goldstein v. Sherman, etc., Ry. Co., 25 Tex. Civ. App. 365, 61 S. W. 336 (1901).

# PART III

# THE OBLIGATION OF THE SHIPPER

## CHAPTER I

## FREIGHT

### SECTION 1.—WHO IS LIABLE FOR FREIGHT

#### NICHOLLS & MORE.

(Court of Common Pleas, 1661. 1 Sid. 86.)

The defendant being a water carrier between Hull and London, the plaintiff delivers goods to him at York to carry them from Hull to London, and the goods being lost the plaintiff brings action upon the case and found for him, and it was moved in arrest of judgment (1) that he did not agree with the carrier to carry them for a sum certain; (2) the agreement was made for their carriage between Hull and London and the defendant had not taken upon himself to convey them from York to Hull.

But this notwithstanding, by THE WHOLE COURT.—The defendant shall be charged upon his general receipt at York in accordance with Southcote's Case [4 Coke, 84], though he says nothing about carrying them to Hull. And as to the other matter, that they have not agreed for a sum certain for carriage between Hull and London it was said by the court that it is not necessary, for the carrier may declare upon a quantum meruit like a tailor, etc. And therefore he shall be held liable, and judgment for the plaintiff.[1]

[1] Acc. Gumm v. Tyrie, 4 B. & S. 680 (1864), "shall pay for freight." See 2 Harvard Law Rev. 59. For freight on articles not within the contract of carriage, see ante, p. 99, note.

The interstate commerce act provides that it shall be unlawful for a carrier subject to its provisions to charge, demand, or receive a different rate from that published in his schedule. Such a carrier may enforce payment of the schedule rate, though he has agreed with a shipper ignorant of the schedule to carry for less. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011 (1906). For state statutes similarly construed, see Haurigan v. Chicago, etc., Co., 80 Neb. 139, 117 N. W. 100 (1908). Under the Illinois statute, which imposes a fine for unjust discrimination, a railroad which

## WOOSTER v. TARR.

(Supreme Judicial Court of Massachusetts, 1864. 8 Allen, 270.)

Contract to recover for the carriage of mackerel from Halifax to Boston.

It was agreed in the superior court that the defendants shipped the mackerel at Halifax, upon a vessel of which the plaintiffs were part owners, said Wooster being master, under a bill of lading in the usual form, to be delivered at Boston "unto Messrs. R. A. Howes & Co., or to their assigns, he or they paying freight for said goods," etc. On the arrival of the vessel at Boston, Wooster was informed by Howes & Co. that the mackerel had been sold "to arrive," to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were then and still are insolvent. The mackerel, at the time of their delivery on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment; but this fact was unknown to the plaintiffs. The mackerel were entered at the custom house in Halifax in the name of the defendants.

Upon these facts judgment was rendered for the plaintiffs, and the defendants appealed to this court.

BIGELOW, C. J. The question raised in this case is very fully discussed in Blanchard v. Page, 8 Gray, 281, 286, 290–295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The dictum of Bayley, J., in Moorsom v. Kymer, 2 M. & S. 318, subsequently repeated by Lord Tenterden in Drew v. Bird, Mood. & Malk. 156, that in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. Sanders v. Van Zeller, 4 Q. B. 260, 284; Maclachlan on Shipping, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their

agrees to carry for an unjustly favored shipper at a low rate can collect only the rate agreed. Ill. Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108 (1905).

assigns, under the circumstances stated, was a breach of good faith towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight money of the defendants. But there are no facts on which to found an allegation of bad faith against the master. He did no act contrary to his contract or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading that the cargo is to be delivered to the person named or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. Shepard v. De Bernales, 13 East, 565; Domett v. Beckford, 5 B. & Ad. 521, 525; Christy v. Row, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.[2]

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## CENTRAL R. CO. OF NEW JERSEY v. MACCARTNEY.

(Supreme Court of New Jersey, 1902. 68 N. J. Law, 165, 52 Atl. 575.)

Certiorari to review a judgment for plaintiff. On the trial below the following facts were found by the court: The Seaboard Company at Brooklyn shipped to the defendants at points in New Jersey a quantity of railroad ties which defendants had purchased of them. The ties were carried on lighters across the harbor and then transferred to cars of the plaintiff railroad company, which delivered them to defendants at destination, at the same time presenting bills for freight and lighterage charges which defendants several days afterward paid.

[2] Acc. Collins v. Union Tr. Co., 10 Watts (Pa.) 384 (1840). And see Spencer v. White, 23 N. C. 236 (1840); Gilson v. Madden, 1 Lans. (N. Y.) 172 (1869), freight tendered by consignee refused by carrier. But see Thomas v. Snider, 39 Pa. 317 (1861). Compare Union R. Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398 (1893).

Subsequently plaintiff found that by a mistake of its clerk the lighterage charges as entered in the bills were $162 smaller than they should have been. Plaintiff paid the lighterman his charges in full, demanded of defendants so much of those charges as defendants had not already paid, and on defendants' refusal brought this action therefor. There seems to have been an understanding between the shipper and the plaintiff, based on usage, that the purchaser was to pay the carrier's charges and might settle for them with his seller by deducting their amount from the purchase price. It did not distinctly appear whether or not defendants knew this. Further facts appear in the opinion.

PITNEY, J.[a] * * * In the absence of some agreement on the part of defendants, either express or implied, there is, in our opinion, nothing to support the present action. The mere existence of the relation of carrier and consignee is not enough to establish an obligation upon the latter to pay the transportation charges. Prima facie, the consignor of freight, who contracts with the carrier for its shipment, is liable to pay the charges of transportation. It is by him that the engagement is made with the carrier. It is for him that the service is performed. The question of his liability, however, is in each instance dependent upon the terms of the agreement actually made between him and the carrier. Whether the consignor is shipping for his own account, or as agent of another; whether he is owner of the goods; whether by the agreement between him and the consignee the title to the goods passes to the latter at the time of delivery to the carrier, or upon delivery to the consignee—these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight.

In the present case the facts leave no room to doubt the consignor's original liability. Not only did the Seaboard Company, through its agent, engage the transportation, and agree with the plaintiff's agent about the terms thereof; not only was this done without the knowledge or participation of the defendants; but by the very terms of sale the ownership of the ties was to remain in the consignor until their delivery at Dunellen and Bound Brook, respectively; and of this the carrier had notice, as will be shown presently. The freight charges being unpaid in advance by the consignor, the carrier was, of course, entitled to a lien upon the goods for the amount of the freight. It was not obliged to make delivery to the consignees until these charges were paid. In such a case, if the lien is waived, and the goods delivered to the consignee, accompanied with notice to him of the amount of the charges remaining unpaid, the decisions hold that acceptance of the goods under such circumstances either amounts to an agreement to pay the freight, or at least is evidence from which such an agreement may properly be inferred. But acceptance by the con-

[a] The statement of facts has been rewritten, and parts of the opinion are omitted.

signee, although accompanied by an undertaking to pay the charges, does not discharge the consignor from liability to the carrier. The two contracts are held to be independent, and not inconsistent one with the other.

The above propositions, so far as they affect the consignor's liability, were fully discussed in the case of Grant v. Wood, 21 N. J. Law, 292, 47 Am. Dec. 162. Upon the general question the following additional decisions may be referred to: Cock v. Taylor, 13 East, 399; Shepard v. De Bernales, 13 East, 565; Wilson v. Kymer, 1 Maule & S. 157; Sanders v. Van Zeller, 4 Adol. & E. (N. S.) 260; Wegener v. Smith, 15 C. B. (80 E. C. L.) 285; Barker v. Havens, 17 Johns. (N. Y.) 234, 8 Am. Dec. 393; Merrick v. Gordon, 20 N. Y. 93–97; Davis v. Pattison, 24 N. Y. 317; Dart v. Ensign, 47 N. Y. 619; Davison v. Bank, 57 N. Y. 81; Elwell v. Skiddy, 77 N. Y. 282; Railroad Co. v. Whitcher, 1 Allen (Mass.) 497; Finn v. Railroad Corp., 112 Mass. 524, 17 Am. Rep. 128 [ante, p. 176]; Railroad Co. v. Wilder, 137 Mass. 536; Railroad Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; 55 Am. & Eng. R. Cas. 695.

Upon reason, as well as by the great weight of authority, it seems entirely clear that the liability of the consignee to pay to the carrier the freight upon the goods transported, in a case such as is here presented, depends not upon any general legal duty resting upon a consignee simply because he is consignee, but upon some agreement or undertaking made by the consignee. Where one accepts delivery of goods from a common carrier, receiving at the same time a statement plainly setting forth the amount of freight charges thereon, with knowledge that the carrier is giving up for the benefit of the consignee a lien upon the goods for the amount so stated, such conduct by the consignee is, of course, cogent evidence, and, standing unexplained and uncontradicted, is sufficient evidence of an implied promise to pay the amount of the stated charges. Such an undertaking was undoubtedly made by the defendants in this case. That undertaking has been performed by them. But we fail to see in the facts, as certified to us by the trial court, anything to support a finding that the defendants, by anything that transpired at or after the delivery of the ties, undertook and promised to pay freight charges indefinite in amount, or any sum beyond that which was stated on the bills as rendered. If the plaintiff, the railroad company, instead of waiving its lien, had insisted upon retaining the ties until payment of the freight, at the same time rendering to defendants the freight bills as in fact they were rendered, and if the defendants had thereupon paid the bills in order to secure the ties, could a further liability be imposed upon them simply on the ground that the bills, as rendered, did not include the entire charges? We think not. In such case the plaintiff would have been left to its action against the consignor, as the party on whose engagement the service was performed.

But, secondly, whether the defendants were or were not originally cognizant of the terms of shipment, so as to be bound in the first instance to pay the just amount of transportation charges, the plaintiff is, in our opinion, estopped from demanding any greater sum than was demanded when the ties were delivered. * * * By means of the representations of the plaintiff the defendants were led to change their position. Not that payment of the freight bills would have completed the estoppel. But when the defendants, in reliance upon the correctness of the freight bills, after paying them and receiving the plaintiff's receipts therefor, proceeded in good faith to close accounts with their consignor, deducting the freight bills as agreed, and paying over the balance due for the ties, the estoppel was complete. For it appears that thereby the defendants parted with the very fund against which alone they had a right to charge the freight. * * *

Let the judgment below be reversed, and final judgment be entered in favor of the defendants, with costs.[4]

## SECTION 2.—WHEN FREIGHT IS EARNED

### CLARK v. MASTERS.

(Superior Court of City of New York, 1857. 1 Bosw. 177.)

Action for the wrongful detention of wheat. Defendants were warehousemen, with whom the wheat had been stored by Fitzhugh & Littlejohn, common carriers by canal boat, who, on arrival of the cargo at destination, had refused, under circumstances stated in the

[4] In White v. Furness, [1895] A. C. 40, 45, where a statute deprived the shipowner of his lien for freight, Lord Hershell, L. C., said: "As soon as the shipowner's lien is discharged he ceases to have any right to the goods which lie in the warehouse. They are not his property; the only right which he ever had to them was a right of lien. * * * How, then, can the receipt of the goods by the agent of the owner from the dock company, who are legally bound to deliver them, give rise to any inference of a promise, or afford the consideration for any promise by the consignee to pay freight to the shipowner?"

See, also, N. Y. & N. E. R. Co. v. Sanders, 134 Mass. 53 (1883), consignee notified by carrier not to take goods without paying freight; Old Col. R. Co. v. Wilder, 137 Mass. 536 (1884), consignee not aware that carrier looked to him for freight; Dart v. Ensign, 47 N. Y. 619 (1872), consignee known to take as agent only.

The assignment of the contract of carriage by indorsement and delivery of a bill of lading to order, though made to a buyer of the goods, does not impose on the assignee a liability for freight. See Sanders v. Vanzeller, 4 A. & E. (N. S.) 260, 295 (1843), changed in England by statute, Bills of Lading Act 1855, 18 & 19 Vict. 111. Nor does it render the indorser liable though the indorsee receives the goods. See Burton v. Strachan, 3 E. D. Smith (N. Y.) 192, note (1854).

opinion, to deliver it to plaintiffs, the consignees. Defendants refused to deliver unless they were paid, not only freight, but storage charges.

DUER, J.[5] * * * There is plainly only one ground upon which the refusal of Littlejohn to deliver the wheat upon the terms proposed can be vindicated, namely: That in giving notice to the plaintiffs of the arrival of the wheat, he had done all he was bound to do, and was entitled to demand the payment of the whole freight and charges, before any part of the cargo was moved; that the notice, in other words, was equivalent to actual delivery. The law was thus laid down by the learned judge upon the trial, and he founded on it a positive direction to the jury to find a verdict for the defendants. * * * The law, by a very reasonable exception, releases the master of a vessel, in which the goods to be delivered are transported, from the duty of seeking out the owner or consignee, and making to him personally an actual delivery or tender of a delivery, but in his case holds it to be sufficient that he gives a written notice to such owner or consignee of the arrival of the vessel, and of the place where the goods will be landed, and their delivery be made, thus casting upon the consignee the duty of attending at the place so designated, of receiving there the delivery of the goods, and paying the freight for their transportation.

We think, however, that we are entirely safe in saying that there is no authority, nor semblance of an authority, for the position that the notice, by the master of a vessel, of the place where he intends to deliver the goods, has the same effect as an actual personal delivery or tender by an ordinary carrier, so as to give to the party in the one case as well as in the other, an immediate right to demand the payment of the freight. We believe the doctrine to be absolutely novel. We are certain it would be most unreasonable. The ordinary carrier, in tendering the goods themselves, does all that the law can require him to perform, all indeed that he can do, to entitle him to his freight. The master, in giving notice to the consignee, performs only a part of the duty that he is bound to perform, to render his demand of freight consistent with law or reason.

It is a serious mistake to suppose that the payment of freight is a condition precedent to the delivery of the cargo in the sense that has been contended for; that is, precedent even to the discharge of the cargo. The discharge or unlading of the cargo is a duty that the law casts upon the master, the whole labor and expense must be borne by him or his owner. To enable him to deliver the cargo, this duty of unlading it must first be performed, and its performance is as truly a condition precedent to the constructive delivery of the goods by a tender, as to their actual, by a change of possession.

The payment of freight and the delivery of the goods are simul-

[5] The statement of facts has been rewritten, and parts of the opinion are omitted.

taneous and concurrent acts; neither, strictly speaking, is a condition precedent to the other. As in the case of the delivery of a deed, and the payment of the purchase money agreed to be made on the same day, they are conditions mutually dependent. The consignee is not bound to pay the freight until the goods are delivered, nor the master to deliver the goods until the freight is paid. If the goods are withheld the freight must be tendered, if the freight, the goods, to enable either party to maintain an action against the other, for a breach of contract.[6] Hence, in the present case, if the master was not in a condition to make an immediate delivery of the wheat, he could have no right to demand the payment of freight; and he certainly could make no delivery that the plaintiffs were bound to accept, so long as the wheat remained on board his vessel, and the duty of discharging it rested upon him. Thus the allegation that the notice which the master had given was alone sufficient to justify his demand of freight, it seems to us, is proved to be groundless. It evidently escaped the attention of the learned judge who tried this cause, and, perhaps, of the counsel, that to discharge the cargo is a duty that belongs to the master, and his performance of it, unless otherwise agreed, a condition precedent to his claim for freight.

But there are other, and very conclusive, reasons for holding that the claim of the master, in the present case, for the whole freight, before the wheat, or any portion of it, was delivered or offered to be delivered, cannot be sustained. We apprehend that it is now settled law, that the owner of goods is not bound to accept their delivery, and pay the freight, until he has had an opportunity of ascertaining how far they correspond in quantity and description with the bill of lading, and of examining into their actual state and condition. He has a right to deduct from the usual or stipulated freight any damage which the goods may have received on the voyage, not imputable to the perils of navigation; and also, any deficiency from the quantity mentioned in the bill of lading;[7] and it is evident that, to enable him to exercise this important right, an examination, prior to the payment of freight, is indispensable. If all the facts, necessary to be known by the owner, can be ascertained by him before an unlading of the cargo, the examination may then be had; but if not, the goods must be unladen at the expense of the master, and placed in a situation to enable the owner effectually to exercise his rights. This right was very

[6] "Where two acts are to be concurrent, there must be a concurrent readiness on both sides—on the one to deliver, and on the other to pay. Each party is entitled to see that the other is ready to do his part, and it is for the jury to say which is in default." Per Montague Smith, J., in Paynter v. James, L. R. 2 C. P. 348, 357 (1867). For the application of the rule where the consignee tenders too little and the carrier demands too much, compare The Norway, B. & L. 404 (1865), with Loewenberg v. Railway Co., 56 Ark. 439, 19 S. W. 1051 (1892).

[7] See post, p. 277, note.

distinctly claimed by the plaintiffs in the present case, and as plainly denied by the master—denied by his refusal to place the wheat in a situation in which it could be examined, unless the whole freight were previously paid. It is true he offered to deliver the wheat, bushel by bushel, receiving a pro rata freight for each bushel as delivered; but it is very clear that this was not an offer to which the plaintiffs were bound to accede.

The contract of affreightment, in respect to each consignment, is entire, and no portion of the freight is due until the whole consignment is delivered. The master has no right to divide and split up the consignment into as many lots or parcels as he may deem convenient, making as many contracts as there are parcels, and as many freights as there are contracts. The freight, when payable, is payable as a whole, and it is not payable until all the goods to which it relates have been delivered or tendered.[8] * * * It is said that the unlading of the wheat, for the purpose of ascertaining its quantity, would have been attended with great labor and expense; but if this unlading was a duty which the carriers undertook to perform, if its performance was necessarily implied in their contract to transport and deliver the wheat, the question of its labor and expense was plainly immaterial. We are bound to presume that they were taken into consideration in fixing the amount of the freight. * * * The plaintiffs offered, at their own expense, to provide a lighter, and that the carriers should retain their possession, and consequently their lien, until the freight was ascertained and paid. It was the manifest duty of the master and his owner, Littlejohn, to have complied with this offer, by unlading and delivering the wheat in conformity to its terms; their refusal to comply with it was in effect a refusal to deliver the wheat at all. It was a breach of their contract, amounting in law to a wrongful conversion to their own use of the property they had undertaken to deliver, and the defendants, by refusing to surrender to the plaintiff, upon request, the property thus wrongfully converted, were guilty of its wrongful detention. Upon the evidence on the trial, the plaintiffs were entitled to a verdict for its full value.

The verdict for the defendants must therefore be set aside, and there must be a new trial, with costs to abide the event.[9]

[8] Acc. 170 Tons of Coal, 9 Ben. 400, Fed. Cas. No. 10,522 (1878); Wayne, J., in Brittan v. Barnaby, 21 How. 527, 16 L. Ed. 177 (1858); 1,265 Vitrified Pipes, 14 Blatchf. 274, Fed. Cas. No. 10,536 (1877), semble.

[9] In Moeller v. Young, 5 E. & B. 7, 19 (1855), consignees who refused to pay freight for that part of the cargo which they had received, the rest being still on the vessel, were held liable for resulting delay. Lord Campbell, C. J., said: "The question, therefore, becomes whether the master was bound to deliver all the goods before he was paid for any. Now, as the delivery and payment should be concurrent acts, if each party stood on his summum jus, a difficulty might arise as to the mode of carrying out the contract. But a reasonable way may be found of performing it. Although part has been delivered, the master may decline to deliver the residue till the freight is paid. Therefore it is true that the master has always been ready to deliver, and that

## WESTERN TRANSP. CO. v. HOYT.

(Court of Appeals of New York, 1887. 69 N. Y. 230, 25 Am. Rep. 175.)

Appeal from a judgment entered on a nonsuit. Plaintiff sued as a common carrier for freight and charges on a cargo of 14,650 bushels of oats carried on his canal boat for defendants from Buffalo to New York. By the bill of lading the consignees were to discharge the cargo within three days after arrival and notice thereof or pay demurrage. The boat arrived in November. Defendants removed 5,000 bushels of oats and then stopped. The three days to finish discharge would have expired Tuesday at midnight, but plaintiff at 6 p. m. took the boat to Brooklyn and stored the rest of the oats with one Barber. In March Barber delivered them to the defendants. In an action by plaintiff against Barber for so delivering, it had been held that under the circumstances plaintiff converted the oats by storing them, and lost his lien for freight.

CHURCH, C. J.[10] The decision in the case of the present plaintiff against Barber, 56 N. Y. 544, disposes of some of the questions involved in this case. * * * The construction of the bill of lading, the character of the act of the plaintiff in storing the oats, and the effect of the act upon its rights to a lien for freight must be regarded as adjudged and settled in the case referred to. * * *

It is urged that the defendants' taking possession of the property entitled the plaintiff to the freight. There is some apparent plausibility in equity in this position, but it must be observed that a delivery to the consignees is as much a part of the contract as the transportation. Mr. Angell, in his work on Carriers, says: "It is not enough that the goods be carried in safety to the place of delivery, but the carrier must, and without any demand upon him, deliver, and he is not entitled

the defendants have entered into a contract to accept, which has been broken."

In Henderson v. 300 Tons of Iron Ore (D. C.) 38 Fed. 36 (1889), Brown, J., said: "When the payment of freight and delivery of the cargo, as a whole, are by the legal rule made concurrent acts, great practical difficulties arise, if the quantity is large and each side stands on its legal rights. The amount may be so great that part of the cargo may have to be removed before the rest is discharged; and if the consignee refuses to pay pro rata freight on what is removable, or to give security for payment, the ship is not bound to deliver piecemeal, and may remove and store such parts as are necessary to be removed at the consignee's expense." See, also, Brittan v. Barnaby, 21 How. 527, 16 L. Ed. 177 (1858).

"In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board; but I never heard of the merchant being called upon to pay for it." Willes, J., in Coulthurst v. Sweet, L. R. 1 C. P. 649 (1866).

"It was the ship's duty, therefore, to ascertain the weight, because she could not lawfully continue to hold possession of the cargo after the consignee was ready to receive it, without informing him as soon as reasonably practicable, of the amount of freight to be paid." Brown, J., in Henderson v. 300 Tons of Iron Ore, supra.

[10] The statement has been rewritten, and parts of the opinion are omitted.

to freight until the contract for a complete delivery is performed." Section 282. When the responsibility has begun, it continues until there has been a due delivery by the carrier. Id., note 1, and cases cited. Parsons on Shipping, 220. And in this case, the bill of lading expressly requires the property to be transported and delivered to the consignees. The delivery was as essential to performance as transportation to New York, and it is a substantial part of the contract. The plaintiff might as well, in a legal view, have stopped at Albany, or any other intermediate port, and stored the grain, as to have stored it in Brooklyn. In either case he could not aver a full performance, nor that he was prevented by the defendants from performing. It follows that he cannot recover upon the contract.[11] Performance is a condition precedent to a recovery. As said by Lord Ellenborough in Liddard v. Lopes, 10 East, 526: "The parties have entered into a special contract by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract, and that event has not taken place, there has been no such delivery, and consequently the plaintiff is not entitled to recover."

As the plaintiff cannot recover under the contract, if he has any

[11] Acc. Holliday v. Coe, 3 Ind. 26 (1851), cargo lost by sinking; Atlantic Mut. Ins. Co. v. Bird, 2 Bosw. 195 (1857), vessel wrecked near destination, cargo brought to destination by cargo owner; China Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576 (1894), owners of cargo on vessel wrecked near destination entitled to proceeds without deduction for freight; The Nathaniel Hooper, 3 Sumn. 542, Fed. Cas. No. 10,032 (1839); The Industrie, [1894] P. 58, cargo justifiably sold at port of distress; Metcalf v. Brittania Co., 2 Q. B. D. 423 (1877), port of destination blocked by ice, carrier insisted on delivering as near thereto as vessel could get; Lane v. Penniman, 4 Mass. 91 (1808), delivery by one who had dispossessed carrier. And see Tirrell v. Gage, 4 Allen (Mass.) 245 (1862); Harris v. Rand, 4 N. H. 555 (1829), goods destroyed after being discharged and ready to deliver, but before consignee had time to take; Duthie v. Hilton, L. R. 4 C. P. 138 (1868), "freight to be paid within three days after arrival and before delivery," and goods destroyed on board vessel at anchor in harbor the night after her arrival.

In Stewart v. Rogerson, L. R. 6 C. P. 424 (1871), a question arose as to a carrier's right to sue for freight on cargo which, in a suit in admiralty against the carrier, had been attached for the purpose of reaching the interest represented by the carrier's lien for freight. The cargo owner might have discharged the attachment and obtained his goods by paying the freight into court. Brett, J., said: "It is clear the plaintiff is not entitled to recover the freight as freight. * * * Once seized, the freighter could not get his goods by going to the ship and paying the freight. I think he was not bound to go to the admiralty court and pay it there."

"If a Ship be freighted out and in, there arises due for Freight, nothing, till the whole Voyage be performed: So that if the Ship die, or is cast away coming home, the Freight outwards, as well as inwards becomes lost." Molloy, De Jure Maritimo, bk. II, c. 4, § 9. Acc. Donahoe v. Kettell, 1 Cliff. 135, Fed. Cas. No. 3,980 (1858).

Compare Aldrich v. Cargo of Coal (D. C.) 117 Fed. 757 (1902), goods delivered after vessel had sunk; Barnett v. Cent. Line, 51 Ga. 439 (1874), goods carried part way by trespasser; Cargo ex Argos, L. R. 5 P. C. 134 (1873), cargo ready to deliver, but, because no one appeared to take, vessel had to sail away with it; Clendaniel v. Tuckerman, 17 Barb. 184 (1853), cargo owner prevented discharge of cargo by wrongfully, though temporarily, obstructing the wharf, and after the lapse of a time ordinarily sufficient for the unloading and receipt of the goods, they were accidentally destroyed while still on board.

claim for freight it is only for pro rata freight, which is sometimes allowed, when the transportation has been interrupted or prevented by stress of weather or other cause. In such a case, if the freighter or his consignee is willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service is rendered, a proportionate amount of freight will be due as "freight pro rata itineris." This principle was derived from the marine law, and it is said that the common law presumes a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination, for he obtains his property with the advantage of the carriage thus far. The principle is based upon the idea of a new contract, and not upon the right to recover upon the original contract. The application of this principle has been considerably modified by the courts.

In the early case of Luke v. Lyde, 2 Burr. 889, a contract was inferred from the fact of acceptance, and the rule was enunciated without qualification that from such fact, without regard to the circumstances, and whether the acceptance was voluntary or from necessity, a new contract to pay pro rata freight might be inferred. Some later English cases, and the earlier American cases, apparently followed this rule; but the rule has been in both countries materially modified, and it is now held that taking possession from necessity to save the property from destruction, or in consequence of the wrongful act of the freighter, as in Hunter v. Prinsey, 10 East, 394, and in 13 M. & Wels. 229, where the master caused the goods to be sold, or when the carrier refused to complete the performance of his contract, the carrier is not entitled to any freight. Parke, B., in the last case, stated the rule with approval, that to justify a claim for pro rata freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with;[12] and Lord Ellenborough,

[12] In the case here referred to, Vlierboom v. Chapman, 13 Mees. & W. 230 (1844), rice so damaged by sea water that it would have been worthless if carried to destination was sold by the master at a port of distress. The shipowner claimed freight pro rata. Parke, B., said: "It was conceded that the true principle upon which this description of freight is due is that a new contract may be implied to pay it, from the acceptance by the consignee of his goods delivered at an intermediate port, instead of the destined port of delivery. * * * But it was said that * * * necessity imposed upon the master the character of an agent for the shipper, in addition to his ordinary one of agent for the shipowner, and that, having that double agency, he might be presumed to have intended to make a reasonable contract between his two principals; that is, on behalf of the shipowner, to give up the goods at the intermediate port, instead of carrying them on, and on behalf of the shipper, to receive them there, and pay reasonable freight for the part of the voyage already performed. It is difficult to conceive any conjuncture in which such a presumption could be made; for the agency of the master from necessity arises from his total inability to carry the goods to the place of destination, which dispensed with the performance of that primary duty altogether, and the right to freight pro rata from the presumed waiver on the part of the ship-

in Hunter v. Prinsey, supra, said: "The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."

Thompson, C. J., in 15 J. R. 12, said: "If the shipowner will not or cannot carry on the cargo, the freighter is entitled to receive his goods without paying freight." It is unnecessary to review the authorities. The subject is considered in Angell on Carriers, § 402 to 409, and Abbott on Shipping (5th Am. Ed.) 547, and in the notes and numerous cases referred to, and the rule as above stated seems to have been generally adopted by nearly all the recent decisions, and its manifest justice commends itself to our judgment. In this case no inference of a promise to pay pro rata or any freight can be drawn. The circumstances strongly repel any such intention. The carrier doubtless acted in accordance with what it believed to be its legal rights, but the act of storing was a refusal to deliver, and, as we held in the Barber Case, supra, a wrongful act amounting to conversion, quite equal in effect to the sale of the goods in the cases cited. The carrier must therefore be regarded as refusing to deliver the oats. Neither the owner nor his consignee intended to waive a full performance or

per of the performance of a duty which the master was ready to execute. * * * But if we suppose that he had a further authority, and that, instead of being the master, he had been supercargo, and that his sale of the goods had been equivalent to a sale by the defendants themselves, present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight pro rata; for the shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage and accept the delivery at the intermediate instead of the destined port."

In Hopper v. Burness, 1 C. P. D. 137 (1876), cargo coal justifiably sold at a port of distress to raise money for necessary repairs to the ship fetched more than it would have brought at destination. It was held that the carrier must account to the shipper for the entire proceeds without deduction for pro rata freight.

"The cotton reached the Morgan Line Pier in New York, and on February 28, 1887, while certain portions of the shipments were either on the pier or on partially loaded lighters alongside the pier, a fire occurred, by which some of the bales were destroyed and other bales were injured to such an extent that, instead of being reconditioned and forwarded to destination, they were sold here. * * * As to each damaged bale, therefore, there arose the question whether it should be reconditioned and forwarded or sold for the benefit of all concerned. It appears from the evidence that the insurance company, which, as abandonee of the damaged cotton, represented the cargo owners, was from the beginning in communication with the representatives of the carrier; that it was informed as to every important step taken; that when there was any question as to whether a bale of cotton should be reconditioned for forwarding or be sold here it was informed and consulted with; and that whatever course was taken, was taken with its approval and concurrence. There is no contradiction of this testimony, and, in our opinion, it clearly makes out a case of voluntary acceptance at the intermediate port, any further carriage of those particular bales being intentionally dispensed with by the owner, and implies a contract to remunerate the carrier for the service

to assume voluntarily to relieve the plaintiff from nonperformance. They claimed the possession of the property and the right to possession discharged from all claim for freight, and indemnified the warehouseman against such claim. Every circumstance repels the idea of a promise to pay pro rata freight. The case stands, therefore, unembarrassed by the circumstance that the consignee took possession of the property under the circumstances, and it presents the ordinary case of an action on contract where the party seeking to enforce it has not shown a full performance.

The next question is, whether the plaintiff is entitled to freight upon the 5,000 bushels delivered. The contract for freight is an entirety, and this applies as well to a delivery of the whole quantity of goods as to a delivery at all, or as to a full transportation. Parsons on Shipping, 204. There are cases where this rule as to quantity has been qualified, but they have, I think, no application to the present case. The delivery of the 5,000 bushels was made with the understanding and expectation that the whole quantity was to be delivered, and no inference can be drawn of an intention to pay freight in part without a delivery of the whole. The quantity delivered must be regarded as having been received subject to the delivery of the whole cargo. There was no waiver. The principle involved is analogous to a part delivery from time to time of personal property sold and required to be deliv-

actually performed. * * * From the decree of the District Court the respondent also appeals insisting that the carrier should be allowed to reserve from the proceeds of the damaged cotton pro rata freight for the bales which were totally destroyed. * * * It is urged that since the bills of lading provide for successive transportations by successive carriers, with a provision that the liability of each carrier for loss or damage to the goods shall cease on his delivery of the cotton to the next carrier, each separate transportation should be treated as a separate voyage. But the contract is a single one for the entire transportation from the port of original loading to the port of ultimate destination. * * * Had the carriers chosen to apportion the freight in advance, and to require the shipper to pay separately for each successive stage of the voyage, it was competent for them to insert such provisions in the contract. Not having done so, their contract must be interpreted as such contracts of affreightment always have been, and their right to demand freight be held dependent upon delivery at destination." Lacombe, J., in British & Foreign Mar. Ins. Co. v. So. Pac. Co., 72 Fed. 285, 18 C. C. A. 561 (1896).

For cases where pro rata freight was allowed, see The Mohawk, 8 Wall. 153, 19 L. Ed. 406 (1868), delivery at intermediate port by shipper's request; Gray v. Waln, 2 Serg. & R. (Pa.) 229, 256, 7 Am. Dec. 642 (1816), higher market at intermediate port; The Teutonia, L. R. 3 A. & E. 394, 416–424 (1871), delivery at destination unlawful (decided on appeal upon another ground); Scow No. 190, 88 Fed. 320 (1898). See, also, Laws of Oleron, art. 4, ante, p. 58.

"Almost all the maritime countries except England * * * regard the freight as a liability from the cargo accruing as it were mile by mile as the vessel proceeds and culminating at its full bill of lading amount at port of destination on safe delivery." Gow, Marine Insurance, 161.

As to the manner of calculating freight pro rata, see Luke v. Lyde, 2 Burr. 889 (1759); Robinson v. Marine Ins. Co., 2 Johns. 323 (1807); Coffin v. Storer, 5 Mass. 252, 4 Am. Dec. 54 (1809); Mitchell v. Darthez, 2 Bing. N. C. 555, 571 (1836); McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405 (1839); Smyth v. Wright, 15 Barb. 51 (1852); The Mohawk, 8 Wall. 163, 19 L. Ed. 406 (1868).

ered. If the whole is not delivered, no recovery can be had for that portion delivered. Champlin v. Rowley, 18 Wend. 187; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Davis v. Pattison, 24 N. Y. 317.

The claim for lake and Buffalo charges stands, I think, upon a different footing. These are stated in the bill of lading at 5¾ cents a bushel, amounting to $842.38. It must be presumed, as the case appears, that the plaintiff advanced these charges; and, if so, it becomes subrogated to the rights of the antecedent carrier. The claim for these charges was complete when the plaintiff received the property to transport, and was not merged in the condition requiring the performance of the contract by the plaintiff to transport the property from Buffalo. That contract was independent of this claim. The bill of lading is for transportation and delivery upon payment of freight and charges; but if the plaintiff had a right to demand any part of the charges independent of the bill of lading, that instrument would not deprive him of such right. We have been referred to no authority making a liability upon such an advance dependent upon the performance of the contract for subsequent carriage. If the action had been by the lake carrier to recover for the freight to Buffalo, it is very clear that the defendants could not have interposed as a defence that the carrier from Buffalo had not performed; and why is not the plaintiff entitled to the same rights in respect to this claim as the former carrier?

I am unable to answer this question satisfactorily, as the case now appears. If these views are correct, a nonsuit was improper, and there must be a new trial with costs to abide event.

Judgment reversed.

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## BRAITHWAITE v. POWER.

**(Supreme Court of North Dakota, 1891. 1 N. D. 455, 48 N. W. 354.)**

CORLISS, C. J.[18] In November, 1880, the steamer Eclipse sailed from Bismarck, in the territory of Dakota, on an eventful voyage up the Missouri river, bound for Ft. Buford, Mont., laden with army supplies consigned to the quartermaster at that point. She never reached her destination, but was frozen in about 60 miles from the fort by water and 35 miles from it by land. There has been much litigation connected with this vessel. Some of it has been finally disposed of (Rea v. Eclipse, 4 Dak. 218, 30 N. W. 159, on appeal 135 U. S. 599, 10 Sup. Ct. Rep. 873, 34 L. Ed. 269), and some of it awaits final settlement by this court on this appeal.

The purpose of this action was to recover full freight for transporting these military stores under an agreement to carry them from Bismarck to Ft. Buford. * * * It is true that the master was at liberty to forward the freight by other means. 1 Pars. Shipp. & Adm.

[18] Parts of the opinion are omitted.

233, and cases cited. This he was given no opportunity to do. It is also true that he might without legal fault have awaited until the opening of navigation in the spring to resume his voyage and transport the freight to its destination in the bottom in which it was originally shipped. It was, of course, his duty in the meantime to protect the property, and this it is undisputed he was doing when it was taken from him by force by a squad of men from the fort, acting under the instructions of the consignee. He protested against this, insisting upon his right to earn his freight by completing the transportation; but all his protests were unavailing, and he finally yielded only to superior force, without resistance, it is true, but this was commendable, as bloodshed would have probably resulted had forcible opposition been interposed.

The master has a lien on the property to enable him to earn his freight. The moment the transportation begins the lien attaches,[14] and is not divested so long as the master is proceeding not in default. The consignor is not bound to pay until the transportation is completed in accordance with the contract, but he may not prevent the master's earning his freight. If he takes possession of the goods short of their destination, when the master, not in default, is willing and able to complete the transportation, he must pay full freight. He has prevented or waived the performance of the condition precedent. The law therefore regards it as performed.

It is true that in this case the performance was prevented by the consignee, and not by the shipper; but in this respect the consignor is represented by the consignee, and the former is responsible for the acts of the latter. The consignor has done his full duty to the consignee when he has paid or agreed to pay freight to a certain point. If the consignee sees fit to take the goods at some other place when the transportation is only partially completed, and when the master is able and willing to perform his contract, he, the consignee, can make no claim against the consignor, and the latter should therefore pay the freight which the master was able, willing, and had a legal right to earn. * * * It cannot be said that the master, by removing the cargo from the steamer to the river's bank, had abandoned the transportation of the goods.[15] This was done for the safety of both

[14] Acc. Bailey v. Damon, 3 Gray (Mass.) 92 (1854), semble. And see Burgess v. Gun, 3 Har. & J. (Md.) 225 (1811); Birley v. Gladstone, post, p. 301.

"If Goods are fully laded aboard, and the Ship hath broke Ground, the Merchant on consideration afterwards resolves not on the Adventure, but will unlade again; by the Law Marine the Freight is due." Molloy, De Jure Maritimo, bk. II, c. IV, 4.

But to the effect that the lien attaches when the shipowner receives the goods, see Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483 (1852); Bartlett v. Carnley, 6 Duer (N. Y.) 194 (1856); Blowers v. One Wire Rope Cable (D. C.) 19 Fed. 444 (1884); Lord Campbell, in Tindall v. Taylor, quoted post, p. 273, note 16.

[15] Where a vessel intentionally abandoned in storm at sea has been brought by salvors to safety, the shipper may have his cargo from the salvors with-

the vessel and the cargo, and was essential to their safety, as it is undisputed that the risk to both from the breaking up of the ice in the spring would have been greater with the steamer loaded than with the cargo on shore.

It was the undoubted duty of the master to do precisely what he did do to protect the interests not only of the owner of the cargo, but of the owner of the boat also. "Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unloaded in order to make the repairs or to insure its safety or ascertain and repair the damage done to it, would such an unloading dissolve the contract for the voyage? Certainly not." Per Story, J., in The Nathaniel Hooper, 3 Sumn. 542–559, Fed. Cas. No. 10,032. See, also, Murray v. Insurance Co., 4 Biss. 417, Fed. Cas. No. 9,955. We hold that full freight was earned.[16] * * *.

out liability to the carrier for damages or freight, though the abandonment was reasonably deemed necessary and the carrier is ready and willing to convey to the original destination. The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115 (1905).

Compare Molloy, De Jure Maritimo, bk. II, c. IV, 13: "A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battle is retaken by another Ship in Amity, and restitution is made, and she proceeds in her Voyage, the Contract is not determined, though the taking by the Enemy divested the Property out of the Owners; yet by the Law of War that Possession was defeasible, and being recovered in Battle afterwards, the Owners became reinvested. So the Contract, by Fiction of Law, became as if she had never been taken, and so the entire Freight becomes due." Compare, also, cases in latter part of note 11, ante, p. 267.

[16] In Tindall v. Taylor, 4 E. & B. 219 (1854), it was held to be no defense to an action for freight brought after the voyage was completed, that the shipper had demanded a return of his goods before the voyage began, especially where bills of lading were outstanding when the demand was made. Lord Campbell, C. J., said: "We entirely agree to the law as laid down by Lord Tenterden in his treatise (8th Ed.) p. 595, and in Thompson v. Trail [2 C. & P. 334], when applied to a general ship, that 'a merchant, who has laden goods, cannot insist on having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him.' It is argued that there can be no lien for freight not yet earned or due; but, when the goods were laden to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is that a contract once made cannot be dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him, on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods."

Compare Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670 (1845), an action of assumpsit for work and labor bestowed upon paintings which defendant had delivered to plaintiff to be renovated. The court said: "The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. * * *

## GRISWOLD v. NEW YORK INS. CO.

(Supreme Court of New York, 1808. 3 Johns. 321, 3 Am. Dec. 490.)

This was an action on a policy of insurance, on the freight of the ship Culloden, valued at $3,300, on a voyage "at and from New York to Barcelona, with liberty to touch at Gibraltar." * * *

The material facts found by the special verdict, and not stated in the former case, were:

In consequence of the vessel's stranding, the whole of the cargo, which consisted of 2,300 barrels of flour, was damaged by the sea water, except between 100 and 200 barrels on the upper tier; the whole of the flour so damaged was so much wet and spoiled as to be totally unfit to be reshipped for that or any other voyage, and if it had been reshipped and carried to its port of destination, it would have been worth nothing, on its arrival there; that if the part which was not wet and damaged had been reshipped with the rest of the cargo in its damaged state, it would have become heated, and more or less spoiled; and that no prudent person would have taken the cargo as a gift, subject to the expense of the freight to Barcelona. * * *

For the plaintiffs, it was contended that * * * in the case of Frith v. Barker, 2 Johns. 327, this court decided that where sugar had been washed out of the hogsheads, which had fallen to pieces, no freight was due. There is, in reason, no difference between that and the present case, where the flour, if it had arrived at Barcelona, would have been worth nothing. * * *

But the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been. To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment."

A carrier is entitled to full freight from a shipper who exercises the right of stoppage in transitu. See Pa. R. Co. v. Am. Oil Works, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 870 (1889). Or through whose default cargo is seized on the voyage by the holder of a respondentia bond. Cargo ex Galam, 2 Moo. (N. S.) 216 (1863). A carrier is entitled to full freight in priority to an attaching creditor of the shipper. Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84 (1874). And in priority to a captor of the goods as enemy property, if his vessel is neutral. The Copenhagen, 1 C. Rob. 289 (1799). His right to the stipulated payment exists under a lump sum charter for a voyage, as well as under a contract for freight in the stricter sense. Cargo ex Galam, supra.

A carrier is entitled only to actual damages if the shipper prevents his earning freight by not shipping any cargo. Ashburner v. Balcher, 7 N. Y. 262 (1852). Or by not shipping the homeward cargo, though the outward cargo has been carried and delivered. Stamforth v. Lyall, 7 Bing. 169 (1830). Or by refusing to redeliver to the carrier, to enable him to complete the voyage, goods of which the carrier has lost possession by stress of weather at sea, and which have come to the shipper's hands. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195 (1902), reversed on another point in 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115 (1905).

KENT, C. J.,[17] delivered the opinion of the court: * * * But it is said that the cargo, if carried on to Barcelona, would not have been worth the freight. This is the import of the special verdict. Here, then, the question arises whether the plaintiffs would not have had their remedy against the shipper, personally, for any deficiency in the freight, or whether the owners could discharge themselves completely by abandoning the damaged cargo to the plaintiffs, after its arrival at Barcelona.

This question has not, hitherto, received any judicial decision in the English courts; and it has been frequently mentioned in this court as a point unsettled. We are, therefore, called to examine the question upon principle, and upon the authority of the marine law of foreign states.

The contract of affreightment, like other contracts of letting to hire, binds the shipper personally, and the lien which the shipowner has on the goods conveyed, is only an additional security for the freight. This lien is not incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration for the freight is the carriage of the article shipped on board, and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The shipowner performs his engagement when he carries and delivers the goods. The condition which was to precede payment is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common-law doctrine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper.

This conclusion appears to be so natural and just that I cannot perceive any plausible ground upon which it has been questioned or denied. The weight of authority is certainly on this side. The French Ordinance of the Marine (tit. du Fret, art. 25) is explicit to the point. This code is not only very high evidence of what was then the general usage of trade, but from its comprehensive plan, and masterly execution, it has long been respected as a digest of the maritime law of all the commercial nations of Europe. Valin, in his commentary upon this ordinance, calls in question the equity of the rule; but his reasoning, when we apply it to the true construction of the

[17] Parts of the statement of facts, of the argument of counsel, and of the opinion are omitted.

contract, is weak and superficial, and it has been exposed and answered, and the solidity of the rule vindicated, by a superior and more luminous jurist. Valin, tom. 1. 670. Pothier, Charte-Partie, No. 59.

But, though this question has never been settled at Westminster Hall, Mr. Abbot (page 243) says that the assumed right to abandon deteriorated goods at the port of discharge is not, in point of practice, claimed in that country, and his opinion is evidently in favor of the rule as established in France. * * * The court are accordingly of opinion that judgment must be rendered for the defendants.

Judgment for the defendants.[18]

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## 'ASFAR & CO. v. BLUNDELL.

(High Court of Justice, Queen's Bench Division. [1895] 2 Q. B. 196.)

Action tried before Mathew, J., without a jury. * * *

MATHEW, J.[19] This is an action brought to recover for a total loss on a policy on profit on charter. * * * The ship took her cargo on board and sailed for the discharging dock in the Thames, but before she reached it she came into collision with another vessel and was sunk, and the cargo remained under water during three tides. A large part of the cargo, as much as 700 tons, consisted of dates. The vessel was raised and taken into dock.

The first question to be decided in this case is whether any freight was payable in respect of the dates. If it was, then there was a profit on the charter freight. If none was payable, there was no profit. Whether or not freight was payable on the dates depended upon their condition. The evidence went to show that they were saturated with sewage, and were in a state of fermentation and putrefaction, and were unquestionably unmerchantable as dates.* It was, indeed, suggested that they still retained the appearance of dates; but if by that suggestion was meant that nothing less than total destruction of the goods would disentitle the shipowner to receive his freight, I can only say that that ancient view of the matter, which was put forward in Cocking v. Fraser, reported in Park on Insurance (8th Ed.) vol. 1,

[18] Acc. Story, J., in Jordan v. Warren Ins. Co., 1 Story, 342, Fed. Cas. No. 7,524 (1840); Hugg v. Augusta Co., 7 How. 595, 12 L. Ed. 834 (1849); Dakin v. Oxley, 15 C. B. (N. S.) 646 (1864).

"Nevertheless, if the merchants shall leave all the goods in the hands of the managing owner of the ship or vessel, which he has brought in his ship, for the freight which they ought to pay him, the managing owner of the ship or vessel has to accept them, and cannot exact anything more from them. And * * * no part owner can object or dispute in any way, for he must take his share of the loss as of the gain, if God gives it." Consulate of the Sea, c. 225.

[19] Parts of the statement of facts and of the opinion are omitted.

* It appeared in the evidence that the dates were sold for £2,400 for the purpose of distillation into spirit, and were transhipped and exported.

p. 247, cannot be treated as law at the present day. Total destruction is not necessary. Destruction of the merchantable character of the goods is sufficient; and in accordance with the principle recognized in Roux v. Salvador, 3 Bing. (N. C.) 266, Dakin v. Oxley, 15 C. B. (N. S.) 646, and Duthie v. Hilton, L. R. 4 C. P. 138, I hold that the plaintiffs were not entitled to receive freight in respect of these dates.[20] * * *

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## LIBBY v. GAGE.

(Supreme Judicial Court of Massachusetts, Suffolk, 1867. 14 Allen, 261.)

The first of these actions was an action of contract brought by the owners of the brig Cascatelle against Charles P. Gage & Co., to recover the freight on a cargo of ice, shipped by the defendants at Richmond, Me., for Mobile, Ala., on board the plaintiffs' vessel, under a bill of lading acknowledging the receipt of "four hundred and six tons of ice; it being understood and agreed as follows: That as ice is a perishable article, the hold of the vessel where it is placed shall

[20] As to what constitutes arrival in specie, see, also, Duthie v. Hilton, L. R. 4 C. P. 138 (1868), cement solidified; Garrett v. Melhuish, 4 Jur. (N. S.) 943 (1858), bricks crushed; Dickson v. Buchanan, 13 Sc. L. R. 401 (1876), wire rusted.

In Dakin v. Oxley, 15 C. B. (N. S.) 646 (1864), Willes, J., said: "In the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains, as, if sugar in mats, shipped as sugar and paying so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless, the question would arise whether, practically speaking, any part of the cargo contracted to be carried has arrived. * * * Where the quantity remains unchanged, but by sea damage the goods have been deteriorated in quality, the question of identity arises in a different form, as, for instance, where a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken shreds, iron all or almost all rust, rice fermented, or hides rotten. In both classes of cases, whether of loss of quantity or change in quality, the proper course seems to be the same, viz., to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived. If it has arrived, though damaged, the freight is payable by the ordinary terms of the charter party; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners. There would be apparent justice in allowing damage of the latter sort to be set off or deducted in an action for freight; and this is allowed in some (at least) of the United States. 1 Parsons on Mercantile Law, 172, note. But our law does not allow deduction in that form; and, as at present administered, for the sake, perhaps, of speedy settlement of freight and other liquidated demands, it affords the injured party a remedy by cross-action only."

In the United States, damage for which a carrier is liable may be set off in his action for freight, or applied in reduction of his lien. Boggs v. Martin, 52 Ky. 239 (1852); Bancroft v. Peters, 4 Mich. 619 (1857); The Tangier, 32 Fed. 230 (1887); Miami Powder Co. v. Port Royal, etc., Ry. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880 (1896); Mo. Pac. Ry. Co. v. Peru, etc., Co., 73 Kan. 295, 302, 85 Pac. 408, 87 Pac. 80 (1906).

not be opened or exposed to the air, unless by stress of weather or wants of the vessel, in which case due protest shall be made, and an account kept of all ice thrown overboard in case of jettison; that the vessel shall be kept regularly pumped out during the passage; that no fish, meat or other articles shall be placed in or with the ice without the consent of the shipper. Which is to be delivered in like good order and condition, with all due diligence (excepting what may be lost by the natural waste of the article) at the aforesaid port of Mobile, Ala. (the dangers of the sea only excepted), unto Messrs. Charles P. Gage & Co., or to their assigns, he or they paying freight for the said ice at seven dollars fifty cents per ton with average accustomed."

The ice was a full cargo, and was stowed by the shippers in the hold and around the mast. The brig sailed from Richmond May 8, 1866, and while prosecuting her voyage lost her foremast and suffered other damage, which made it necessary for her to put into New York for repairs, which she did May 28th. In making the repairs, it became necessary to take out the old mast and put in a new one, and there was some melting and loss of ice occasioned by admitting the air into the hole where the mast was taken out, as also by the delay occasioned by putting into New York for repairs. The vessel sailed from New York June 12th, and arrived at Mobile July 14th.

In an ordinary voyage from Richmond to Mobile, a cargo of ice would not usually waste more than 25 per cent.; in this case, there was only about 50 per cent. of the ice delivered. The custom in regard to ice freights on ordinary voyages is to pay freight on the amount of ice put on board, although the whole amount put on board is never delivered, as ice is always wasted somewhat on a voyage.

The parties submitted the case above stated to the decision of the court, and agreed that if the plaintiffs were entitled to recover the whole amount of the freight money as by the bill of lading, judgment should be rendered for them accordingly; if not, the action should be referred to an assessor to determine the amount due under the direction of the court.

GRAY, J. This action is brought by the owners of a ship against the shippers and consignees of the cargo to recover freight according to the terms of the bill of lading. The question whether any deduction is to be made from the plaintiffs' claim is to be determined by the application of well-settled principles of law to the peculiar facts of the case.

The general rule is that the shipowner, in order to earn his freight, must perform his contract by carrying the goods to and delivering them at the port of destination, unless such performance is prevented or waived by the act of the consignee, or unless the goods perish by an intrinsic principle of decay naturally inherent in the commodity itself, the risk of which, whether active in every situation, or only in the confinement and closeness of a ship, rests upon the owner of

the goods. Abbott on Shipping (7th Ed.) 406, 428; 3 Kent, Com. (6th Ed.) 219, 228; The Nathaniel Hooper, 3 Sumn. 554, Fed. Cas. No. 10,032; Clark v. Barnwell, 12 How. 282, 13 L. Ed. 985. Perils of the sea are ordinarily excepted, as they are in this bill of lading. The carrier, not insuring the goods either against perils of the sea or against their own decay or evaporation, is entitled to his freight upon delivering them at the port of destination, however much diminished in bulk or value, either by perils of the sea, or by intrinsic defect, without his fault. 3 Kent, Com. 225; McGaw v. Ocean Ins. Co., 23 Pick. 412, 413; Lord v. Neptune Ins. Co., 10 Gray, 114, 119; Steelman v. Taylor (1856) 3 Ware, 52, Fed. Cas. No. 13,349, 19 Law Rep. 36; The Norway, 3 Moore, P. C. (N. S.) 245.

But although he does not assume the risk of perils of the sea, yet if the goods are wholly lost by such perils, or by jettison to avoid them, he does not earn the freight, because he does not deliver the goods at the port of destination. And a loss by the fault of the carrier or his servants of any part of goods shipped under an entire contract of affreightment will defeat his right to recover any freight. Sayward v. Stevens, 3 Gray, 97.[21] The substance and effect of these principles may be stated thus: Neither party insures the other against perils of the sea; the shipper takes the risk of intrinsic decay of the goods; and the carrier is responsible for his own negligence. Under one entire contract of affreightment therefore, if the goods are wholly lost by perils of the sea, or the whole or part of them is lost by the fault of the carrier, he can recover no freight; but if part only of the goods is lost by perils of the sea,[22] or a part or even the whole perishes by intrinsic decay, he is entitled to full freight.

[21] But see The Tangier (D. C.) 32 Fed. 230, 232 (1887); The Norway, 12 Moo. (N. S.) 245, 266 (1865); Carver, Carriage by Sea, § 550. In Merchant Shipping Co. v. Armitage, L. R. 9 Q. B. 99 (1873), Bramwell B., said: "Suppose that £5 worth of these goods had been stolen by the crew, that would not be within the exceptions; then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied? The defendants would have had to pay the freight and seek their remedy by a cross action."

[22] In Willett v. Phillips, 8 Ben. 459, Fed. Cas. No. 17,683 (1876), the char ter party provided that the charterer should load a full cargo and pay as charter hire $3,000 "in cash on the correct delivery of the cargo." Blatchford, J., said: "But even on the assumption that perils of the sea caused the non-delivery of the cargo which was not delivered, the libelants are not entitled to recover. The contract was a unit. Being a contract for the conveyance of merchandise for an agreed price, it was entire and indivisible, and, as the vessel did not completely perform it, she is not entitled to any part of the $3,000. The freight was not earned by a strict performance of the contract, and therefore no freight becomes due."

In Robinson v. Knights, L. R. 8 C. P. 465 (1873), a ship was chartered to carry and deliver a full cargo "on being paid freight as follows; a lump sum of £315." Part of the cargo was lost by excepted sea perils. The shipowner was held to be entitled to the full sum. Brett, J., said: "What is really paid for is the use of the ship for carrying such cargo as the freighter chooses to put on board. * * * That is to say, the freight is a gross sum for the use of the entire ship, instead of being paid in respect of each part of the cargo."

But treating the contract of affreightment as entire and indivisible often produces hardship and injustice; either by charging the owner of goods with full freight, when the greater part of the goods has been lost by perils of the sea, and but a small remnant is finally delivered; or by refusing to allow any freight to the owner of the ship, when only a small portion of the goods has been lost or omitted to be carried by his fault, and he safely carries the residue to the port of destination, but the consignee there refuses to receive it or to pay freight. The parties therefore, by the terms of the charter party or bill of lading, often modify the contract by providing that freight shall be paid by the cask, or package, or ton; and when the parties have thus made divisible what would otherwise be entire, so many casks, packages or tons as the shipowner does not take and carry according to his contract, or as are lost by perils of the sea, may be deducted, and freight recovered for those remaining, and for those only.[28] 3 Kent, Com. 227; Bigelow, J., in Sayward v. Stevens, 3 Gray, 103.

Thus in Ritchie v. Atkinson, 10 East, 295, the master of the ship agreed by charter party to take and carry from St. Petersburg to London a complete cargo of iron and hemp at certain rates per ton, and actually took and carried an incomplete cargo of those articles, and was held to be entitled to recover freight at the stipulated rates for the amount carried and delivered, leaving the shipper to his remedy by a cross action for the short delivery. And in Frith v. Barker, 2 Johns. (N. Y.) 327, 190 hogsheads of sugar were shipped at the rate of freight, as stated in the bill of lading, of $7 per hogshead;

He referred to the case of The Norway, Brown & Lush. 404, 3 Moo. P. C. (N. S.) 245 (1865), in which Knight Bruce, L. J., said: "Although the lump sum is called freight in the charter party and bills of lading, we think it is not properly so called, but that it is more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyages."

"No doubt, where a lump sum is specified as the freight to be paid on delivery, whether by charter party or bill of lading, the consignee, accepting the goods, must pay the stipulated sum without deduction for what may be lost without the fault of the ship." Brown, J., in Gibson v. Brown (D. C.) 44 Fed. 98 (1890). See, also, The Tangier (D. C.) 32 Fed. 230 (1887); Ritchie v. Atkinson, 10 East, 295 (1808), stated in the text.

In the following cases charter freight, payable according to weight or measurement of cargo shipped, was held payable in full, as a lump sum, though part of the cargo was lost: The Defiance, 6 Ben. 162, Fed. Cas. No. 3,740 (1872), 112 cords of wood, port of loading inspection, at $4 per cord: Harrison v. 1,000 Bags of Sugar (D. C.) 44 Fed. 686 (1890); Christie v. Davis Co. (D. C.) 95 Fed. 837 (1899).

In the following cases common carriers by water recovered full bill of lading freight, though neither ship nor goods reached destination: The Queensmore, 53 Fed. 1022, 4 C. C. A. 157 (1893), cattle at 80 shillings per head shipped, though lost in any manner whatsoever, payable in Liverpool on arrival of ship; Portland Flouring Mills Co. v. Marine Ins. Co., 130 Fed. 860, 65 C. C. A. 344 (1904), freight to be earned, steamer or goods lost or not lost.

[28] Acc. Hinsdell v. Weed, 5 Denio (N. Y.) 172 (1848), freight of $83 for a shipment of barrels of flour held apportionable; Price v. Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645 (1870); The Marcella, 1 Woods, 302, Fed. Cas. No. 13,797 (1873); Christie v. Davis Co. (D. C.) 95 Fed. 837 (1899). And see Edward Hines Co. v. Chamberlain, 118 Fed. 716, 55 C. C. A. 236 (1902).

on the voyage the ship met with perils of the sea, by which all the sugar was washed out of 50 of the casks, and the remaining 140 casks of sugar arrived and were delivered; and it was held that freight could be recovered on the latter only.

The bill of lading of this ice fixes the rate of freight by the ton, and contains no other provision to modify the application of the general rules of law. The stipulation which recognizes the perishable nature of the article, and provides that "the hold of the vessel in which it is placed shall not be opened or exposed to the air, unless by stress of weather or wants of the vessel, in which case due protest shall be made, and an account kept of all ice thrown overboard in case of jettison," raises no implication that if the ice is so exposed, and thereby diminished in bulk, freight should be paid on the amount so lost. The exception of "natural waste" does not cover all waste or melting from whatever cause, but only the waste arising from the very nature of the ice itself, and merely affirms what the law would otherwise have implied. The custom to pay freight on the amount of ice put on board, without deduction for the necessary waste on the voyage, accords with the terms of the contract and with the general rules of law.

It is agreed that in this case the melting and loss of ice were occasioned in part by the delay resulting from putting into port in consequence of perils of the sea, and in part by admitting the air into the hole where the mast was taken out. The waste, decay or deterioration of goods in the hold of a vessel, though aggravated by protraction of the voyage in consequence of meeting with perils of the sea, is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods, and not to the perils of the sea, as the proximate and efficient cause. Baker v. Manuf. Ins. Co., 12 Gray, 603; Clark v. Barnwell, 12 How. 282, 283, 13 L. Ed. 985. It is not pretended that the sea broke into the hold or in any way directly affected the ice so as to diminish its quantity. The delay in the port of repair, like a retardation of the voyage by baffling winds, simply afforded more time for the ice to diminish, from its inherent liability to waste away; and such diminution during such delay, as well as on the voyage before and afterwards, was natural waste, which was at the risk of the owner of the cargo, and did not affect the shipowner's claim for freight.

But the diminution in bulk from necessary exposure to the air and climate, in order to repair injuries which the ship had suffered from perils of the sea, was directly attributable to such perils, as much as if a portion of the cargo had been washed out by the waves or thrown overboard to enable the ship to ride safely in a storm. The exception of "natural waste" does not cover the destruction of ice by this extraordinary exposure for the purpose of making necessary repairs; just as it has been held by this court that insurers declared in the policy to be "not liable for ice melting in consequence of putting into

port" were not thereby exempted from loss by the necessary unlading of the ice to examine and repair the vessel. Tudor v. New England Ins. Co., 12 Cush. 554. If indeed this contract of affreightment had been entire and the freight estimated at a gross sum for the whole cargo, this diminution also would not have reduced the amount of freight due after transportation of the residue to the port of destination and delivering it there. But the freight was payable by the ton, and the contract of affreightment thus made divisible; and therefore on that portion of the cargo which was lost by opening the hold, and for that reason not carried to the port of destination, no freight is due.

As the waste on the voyage from the port of departure to the port of repair did not affect the claim for freight, the cargo is to be estimated at the latter port as if it had still been 406 tons complete; then such proportion of that number of tons, as the amount of ice melted and lost by the opening of the hold for the purpose of necessary repairs of the ship bears to the quantity of ice on board when such repairs were begun, is to be deducted from the whole number of 406 tons; and on the residue, so computed, inasmuch as no further deduction is to be made for the waste of the ice on the completion of the voyage, freight is payable at the stipulated rate of seven and a half dollars a ton.

For the purpose of making this computation, and in accordance with the agreement of parties, this case is referred to an assessor.[24]

[24] "If you have chartered your ship to carry slaves, no payment is due you for the carriage of a slave who has died on board.

"Paulus: Not so. The question is what was the transaction? whether payment was to be made for those placed on board or for those carried. And if this cannot be shown, it will suffice for the shipmaster to show that the slave was put on board."

Digest, lib. xiv, tit. ii, fr. 10.

In the following cases freight was allowed on goods which had perished by reason of their intrinsic character: Nelson v. Stephenson, 5 Duer (N. Y.) 538 (1856); Steelman v. Taylor, 3 Ware, 52, Fed. Cas. No. 13,349 (1856); The Cuba, 3 Ware, 260, Fed. Cas. No. 3,458 (1860). Compare Linklater v. Howell (D. C.) 88 Fed. 526 (1898). Contra: Carver, Carriage by Sea, § 548.

In The Fortuna, Edw. Adm. 56 (1809), Sir W. Scott said that a shipowner "could have no right [to freight] but upon an entire execution of the contract, or such an execution as he could effect consistently with the incapacities under which the cargo might labor. Where such an incapacity on the part of the cargo occurs, he has done his utmost to carry the contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract is not performed. On the other hand, where the vessel itself is incapacitated, no right accrues to her owner; he can have no right to demand that for which he stipulated only on the performance of his engagement. The general principle has been stated very correctly, that where a neutral vessel is brought in, on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo."

In Gibson v. Sturge, 10 Ex. 622 (1855), a cargo of wheat from Odessa to Gloucester was by the terms of the bill of lading to be delivered on payment of freight at a certain rate per quarter. Its bulk on delivery exceeded its bulk at shipment by nearly 5 per cent. apparently because it had absorbed moisture on the voyage. It was held by a majority of the court that freight was due

## BROWN v. HARRIS.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 359.)

THOMAS, J.[25] The agreed statement of facts shows a contract by the defendant to transport the plaintiff as a passenger in the defendant's ship, from San Francisco to Panama, for the sum of $50, paid in advance. It shows also a failure to perform that contract, and that such failure was owing solely to the wrecking of the ship by a storm, and the consequent breaking up of the voyage. The plaintiff was put on shore at Mazatlan, less than half the distance to the port of destination, and there left; no provision having been made by the defendant to send him to Panama by any other ship, nor any offer to do so. The question is, can the plaintiff recover the whole or any part of the passage money so paid? And we are of opinion that he can recover the whole.

The rule is well settled as to freight for the carriage of goods. If freight be paid in advance, and the goods not carried by reason of any event, not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary; and such agreement cannot be inferred from the mere fact of payment in advance. The contract is entire, and unless the voyage be fully performed by a delivery at the port of destination, nothing has been earned. * * *

Passage money and freight are governed by the same rules. Indeed freight, in its most extensive sense, is applied to all compensation for the use of ships, including transportation of passengers; and for all purposes, except lien, Lord Ellenborough says, they seem to be the same thing. Mulloy v. Backer, 5 East, 321. See, also, Howland v. Brig Lavinia, 1 Pet. Adm. 123, Fed. Cas. No. 6,797; 3 Kent, Com. 219; Abbott on Shipping (5th Am. Ed.) 405, note; Angell on Carriers, § 391; Watson v. Duykinck, 3 Johns. (N. Y.) 335.

No question is open upon the agreed statement of facts as to the

only upon the bulk shipped. Alderson, B., said: "Now, if the rule be, that, in the absence of any special stipulations, the freight is due for that quantity which has been carried for the whole voyage, as I think it is, it seems to me to follow as a necessary consequence, that the less amount alone falls within that category. It is true, perhaps, that the same individual grains are carried throughout, but they measure more in bulk on their arrival than at their loading. The case seems to me to be in close analogy to that of the pregnant females mentioned in Molloy, bk. 2, c. 4, § 8, where no freight is payable for the infants of whom they are delivered during the voyage. And, again, where freight is contracted for the transporting of animals, and some die during the voyage, the freight is payable only for those which arrive safe. And, again, where goods, as in the case of molasses, have wasted in bulk during the voyage, freight is payable for the amount which arrives. These are admitted cases. Now, all these cases can only, as it seems to me, be reasonably explained on the principle, that, in such cases, the freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant."

[25] The statement of facts and a part of the opinion have been omitted.

form of action; but if there were, it is a familiar principle of law that when money is paid by one party in contemplation of some act to be done by the other, and the thing stipulated to be done is not done, the money may be recovered back in an action for money had and received.

Judgment for the plaintiff.[26]

## SECTION 3.—LIEN FOR FREIGHT

LAWS OF WISBY, Art. 58: "Likewise when a master has unloaded goods out of his ship, he may keep the goods alongside for the freight, and for the expenses for which they may be liable, unless the master will entrust them."

CONSULATE OF THE SEA, c. 225: And if by chance the said merchants shall ask of the managing owner of the ship or vessel, if he will accept for his freight a portion of the very same goods which he has brought in his ship, * * * and if he will allow them to discharge so much until he has enough left to pay the freight * * * he may do so, but the said merchants cannot force him. * * *

[26] "* * * And if the passenger goes away without leave of absence, and does not come at the term when the ship sails, if the passenger has paid a thousand marks of earnest money, or if he has paid the whole freight, the master is not bound to return any of it." Consulate of the Sea, c. 71.

"This vessel * * * was obliged to unlade and could not proceed. No passage money is due before the passenger arrives at the port of destination, unless compensation pro rata itineris is agreed to be paid. His expenses, or the means of proceeding to the place of destination, must be paid, or tendered, to a passenger. On refusal to proceed, compensation pro rata is demandable." By the court, in Howland v. The Lavinia, 1 Pet. Adm. 123, Fed. Cas. No. 6,797 (1801).

"It is settled, by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost and the freight therefor not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours." Cockburn, C. J., in Byrne v. Schiller, L. R. 6 Ex. 319, 325 (1871).

"I apprehend that rule [the English rule] to be that a prepayment of freight is not recoverable, and that it depends upon this: That there is an implied understanding that it shall be made once for all, and shall not be subject to any contingency. Foreign law requires that for this purpose there shall be an express agreement between the parties; our law, on the contrary, supposes there is an implied agreement unless it is expressly excluded." Montague Smith, J., Id. 327.

See, also, De Sola v. Pomares (D. C.) 119 Fed. 373 (1902); Oriental S. S. Co. v. Taylor, 2 Q. B. 518 (1893).

## ANONYMOUS.

(Court of King's Bench, 1701. 12 Mod. 447.)

HOLT, C. J. Every master of a ship may detain goods till he be paid for them; that is, for their freight.

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## SKINNER v. UPSHAW.

(Court of Queen's Bench, 1702. 2 Ld. Raym. 752.)

The plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, etc. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, etc., and therefore he retained them. And it was ruled by HOLT, Chief Justice at Guildhall (the case being tried before him there), May 12, 1 Ann. Reg. 1702, that a carrier may retain the goods for his hire; and upon direction the defendant had a verdict given for him.

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## BOGGS v. MARTIN.

(Court of Appeals of Kentucky, 1852. 52 Ky. 239.)

SIMPSON, J.[27] This action of replevin was brought by Martin against Boggs and Russell for 93 barrels of pitch and rosin.

The property sued for was shipped at New Orleans on the steamboat Cincinnatus, to be delivered at the port of Louisville to the plaintiff, he paying freight for the same at the rate of 37 cents per barrel. * * * Where there is no special contract to the contrary, the carrier has a lien upon the goods and a right of detention until the freight is paid, and he may detain any part of the merchandise contained in the same bill of lading, and consigned to the same person, until the freight upon the whole of it be paid.[28] Abb. on Shipp. 247. But if he once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and can not afterward reclaim them. Id. 248.

The question in this case upon the evidence was, had the goods passed out of the hands of the agents of the boat, and the lien upon them for the payment of the freight been thereby lost?

Upon this point the court below instructed the jury: "If they be-

[27] Part of the opinion has been omitted.

[28] Acc. Potts v. N. Y. & N. E. R. Co., 131 Mass. 455, 41 Am. Rep. 247 (1881); Pa. Steel Co. v. Ga. R. Co., 94 Ga. 636, 21 S. E. 577 (1894).

lieved from the evidence that the rosin and pitch were put out of the steamboat on the wharf in Louisville, and the bill of lading was sent to the plaintiff, and he took possession of and hauled away one load or any part of the rosin and pitch with the consent of the defendants, these facts themselves constituted, in law, a delivery of possession, and the lien for the freight was thereby lost."

This exposition of the law we deem erroneous, for the following reasons:

The goods, although put out of the steamboat on the wharf, were still in the possession of the agents of the boat, as it clearly appeared from the testimony; and the act of unloading a boat and placing the merchandise on the wharf does not indicate any intention to part with the possession of it until the freight is paid. Indeed, the law is, that the officers cannot detain the goods on board the boat until the freight is paid, as the merchant or consignee would then have no opportunity of examining their condition. Abbott, 248.

It was the duty of the carriers to send the bill of lading to the consignee, to apprise him that the goods had arrived and were ready to be delivered, so that he could attend and examine their condition, pay the freight due, and take them into his possession. Sending the bill of lading to him, therefore, amounted to nothing more than a communication of the fact that the goods had arrived and an offer to deliver them upon the payment of the freight. No other inference arises from the act, nor could it justly create an implication that the delivery of the bill of lading was intended to operate as a waiver of the lien for the freight, and a delivery of the possession of the goods to the consignee.

As the master may detain any part of the merchandise for the freight of all that is consigned to the same person, and as, if he make a delivery of part to the consignee, he may retain the residue even against a purchaser until payment of the freight of the whole (Sodergreen v. Flight, 6 East, 622), the delivery in the present case of the seven barrels of the pitch and rosin did not necessarily constitute a delivery of the whole to the consignee. A delivery of part will, in some cases, amount to the delivery of the whole, but whether it is in a particular case to have that effect or not will depend upon the intention with which the act was done. The seven barrels were no doubt allowed to be taken, under the belief that the freight would be paid without objection, but the permission to take the possession of part did not amount to a waiver of the lien upon the residue by legal implication nor to a constructive delivery of that residue to the consignee, unless it was given with that intention, which was a matter of fact for the jury to determine.

These acts, therefore, neither separately nor in conjunction constituted by legal deduction a delivery of the possession of the whole of the goods to the plaintiff.

Wherefore, for the error of the court in its instruction to the jury, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.[29]

[29] The right to the possession of the goods until freight is paid is in general lost by delivery. Lembeck v. Jarvis Co., 68 N. J. Eq. 492, 59 Atl. 360 (1904), affirmed 69 N. J. Eq. 781, 63 Atl. 257 (1906). As to what constitutes such delivery as to end the lien, see Lane v. Old Colony R. Co., 14 Gray (Mass.) 143 (1859). Compare Bigelow v. Heaton, 6 Hill (N. Y.) 43 (1843), delivery obtained by fraud; Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080 (1906), goods taken without carrier's consent. The lien may be waived, without delivery. N. H. & N. Co. v. Campbell, 128 Mass. 104, 35 Am. Rep. 360 (1880). It does not exist where the carrier has contracted to deliver without requiring payment, even though payment is in default and shipper and consignee insolvent. The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662 (1866). But courts incline to interpret contracts as not being promises to deliver without payment. The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991 (1834), freight payable 10 days after arrival; The Kimball, 3 Wall. 37, 18 L. Ed. 50 (1865), half in 5, half in 10, days after discharge; The Bird of Paradise, 5 Wall. 545, 561, 18 L. Ed. 662 (1866), bill of exchange taken in conditional payment; Atchison, etc., Ry. Co. v. Hinsdell, 76 Kan. 74, 90 Pac. 800, 12 L. R. A. (N. S.) 94 (1907), "this agreement contains all terms relating in any manner to the transportation." There is no lien on one shipment for freight on another. Atlas S. S. Co. v. Columbian Land Co., 102 Fed. 358, 42 C. C. A. 398 (1900). Nor, where a shipper has furnished part, but not all, of a cargo contracted for, is there a lien on the goods shipped, for freight, commonly called "dead freight," that would have been earned on the part not shipped, though the shipper has expressly contracted to pay dead freight. Phillips v. Rodie, 15 East, 547 (1812). The lien entitles a carrier to possession as against an attaching creditor of the owner. Wolfe v. Crawford, 54 Miss. 514 (1877). Or a vendor who stops in transitu. Potts v. N. Y. & N. E. R. Co., 131 Mass. 455, 41 Am. Rep. 247 (1881).

A common carrier has a lien for passage money on baggage delivered to it for carriage. Roberts v. Koehler (C. C.) 30 Fed. 94 (1887). But has no right to wrest a parasol as security from a passenger who refuses to pay fare. Ramsden v. B. & A. R. Co., 104 Mass. 117, 6 Am. Rep. 200 (1870). But it has been held that a railroad company may prevent a passenger removing from its car a bag in the passenger's custody containing a large sum of money until a price for its carriage has been paid. Hutchings v. Western R. Co., 25 Ga. 61, 71 Am. Dec. 156 (1858). And that, where a known rule requires surrender of ticket on leaving the boat, a passenger attempting to leave without surrendering a ticket or paying fare may be detained by the steamboat company to investigate the truth of his story that his ticket is lost. Standish v. Narragansett S. S. Co., 111 Mass. 512, 15 Am. Rep. 66 (1873).

A private carrier has a right to detain goods for freight for maritime transportation. The Eddy, 5 Wall. 481, 18 L. Ed. 486 (1866). And so by the better opinion has a private carrier by land. Jones on Liens, § 276; Hutch. on Carriers, § 46. Contra: Thompson v. N. Y. Storage Co., 97 Mo. App. 135, 70 S. W. 938 (1902), semble. "On what principles rests the general lien of goods for freight? The master is the agent of the shipowner, to receive and transport; the goods are improved in value by the cost and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and shipowner, and the law will not suffer that possession to be violated until the laborer has received his hire." Johnson, J., in Gracie v. Palmer, 8 Wheat. 605, 635, 5 L. Ed. 696 (1823).

A maritime carrier has not only a common-law right to detain, but a right, in the nature of an interest in the goods, called a "maritime lien," to proceed in admiralty by process issued against the goods to have them sold to satisfy his claim for freight.

"It is a right adhering to the thing, a jus in re, which is to be made available by process against the thing in specie." Ware, J., in Drinkwater v. The Spartan, 1 Ware, 145, Fed. Cas. No. 4,085 (1828).

The latter right is not now considered to be dependent upon possession, although delivery without notice, within a reasonable time, of intent to retain

## ROBINSON v. BAKER.

(Supreme Judicial Court of Massachusetts, 1849. 5 Cush. 137, 51 Am. Dec. 54.)

Replevin for 600 barrels of flour received from plaintiff's agent at Black Rock by the Old Clinton Line, common carriers by canal boat, who by bill of lading undertook to carry them to East Albany and there deliver to Witt, agent of the Western Railroad. The Western Railroad, with its connections, extended from East Albany to Boston, and plaintiff had a contract with it for carrying his flour to Boston. When the flour arrived at Albany, Witt said he could not take it off the boat that day, nor until she could be unloaded in her turn with other boats. Thereupon the Old Clinton Line shipped the flour by the Albany and Canal Line to New York, to be forwarded by them to Boston, which they did by shipping it at New York on a schooner of which defendant was master, with instructions to deliver to plaintiff on his paying or promising to pay all freights. When the flour reached Boston, plaintiff demanded it. Defendant refused to deliver, on the ground that he had a lien for freight. The case was reported by the trial judge for the consideration of the whole court. If the instruction to the jury was correct, defendant to have judgment; if defendant had no lien upon any ground open upon the case stated, plaintiff to have judgment, with nominal damages.

FLETCHER, J.[80] (after stating the facts, the instructions requested, and the instructions given). As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton Line and the Albany and Canal Line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is whether, if a common carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether, if goods are stolen and delivered to a common carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner until the carriage is paid.

the right, will ordinarily be treated as a relinquishment of it, and will also prevent its enforcement as against interests subsequently acquired by others. 151 Tons of Coal, 4 Blatchf. 368, Fed. Cas. No. 10,520 (1859); Blowers v. Wire Cable (D. C.) 19 Fed. 444 (1884); The Giulio, 34 Fed. 909 (1888); Wellman v. Morse, 76 Fed. 573, 22 C. C. A. 318 (1896). Compare Bags of Linseed, 1 Black, 108, 17 L. Ed. 35 (1861).

[80] The statement of facts has been rewritten, and parts of the opinion omitted.

It is certainly remarkable that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of York v. Grenaugh, 2 Ld. Raym. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice Holt cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them and carry them, and therefore, since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in York v. Grenaugh of the Exeter carrier. In 1843 there was a direct adjudication upon the question now under consideration in the Supreme Court of Michigan, in the case of Fitch v. Newberry, 1 Doug. 1, 40 Am. Dec. 33. The circumstances of that case were very similar to those in the present case. * * * The decision was against the carrier. * * * This decision is supported by the case of Van Buskirk v. Purinton, 2 Hall (N. Y.) 601. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner he brought trover and was allowed to recover the value, although the defendants insisted on the right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of Saltus v. Everett, 20 Wend. (N. Y.) 267, 275, 32 Am. Dec. 541, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent,

and consequently, that, even the honest purchaser under a defective title cannot hold against the true proprietor." * * * There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who, in fact, had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of caveat emptor apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may, in all cases, secure the payment of the carriage in advance. In the case of King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied that upon the adjudged cases, as well as on general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.[81]

[81] Acc. Bassett v. Spofford, 45 N. Y. 387, 6 Am. Rep. 101 (1871), stolen goods shipped on vessel; Savannah Ry. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401 (1905), horse shipped by servant without authority. And see Gilson v. Gwinn, 107 Mass. 126, 9 Am. Rep. 13 (1871), leased sewing machine moved with other furniture; Corinth Engine & Boiler Works v. Miss. Cent. R. Co. (Miss.) 49 South. 261 (1909). Compare Crossan v. N. Y. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408 (1889), second carrier held to have lien for usual charge on perishable goods, though owner was known to have instructed first carrier to ship at a lower rate.

"To incumber an innkeeper or a carrier with the obligation of inquiring and determining the relation in which the guest or the sender of the goods stands in reference to his possession of what he brings would be totally inconsistent with the relations in which both the innkeeper and the carrier stand toward

## BRIGGS v. BOSTON & L. R. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, 1863. 6 Allen, 246, 83 Am. Dec. 626.)

Tort for the conversion of sixty-seven barrels of flour. Upon agreed facts, which are stated in the opinion, judgment was rendered in the superior court for the plaintiff, for the amount received by the defendants upon the sale of the flour by them, deducting the sum claimed by them as the amount for which they had a lien on the flour, and the expenses of the sale; and the defendants appealed to this court.

MERRICK, J.[82] The plaintiff, who resides at Racine, in the state of Wisconsin, delivered the flour, the value of which he seeks to recover in this action, to the Racine & Mississippi Railroad Company, taking from their agents a receipt, in which they agreed to forward and deliver it to Franklin E. Foster, at Williamstown, in this state. By mistake of the agents of that company, the flour was erroneously directed or billed to Wilmington, where there is a freight station on the road of the defendants. It was carried by the Racine & Mississippi Company over their road, and at its eastern termination delivered to the carriers next in succession in the line and route from Racine to Wilmington. And it was thus transported by the successive carriers in that line and route in their vessels and cars respectively, according to the bills and directions under which it was forwarded from Racine, until it arrived in due time at Groton, the point of the commencement of the road of the defendants. And it was there received by them, they paying the freight earned by all the preceding carriers, and carried to Wilmington, where it was duly deposited in their freight depot. But Franklin E. Foster, to whom it was directed, did not reside or have any place of business at Wilmington, and the defendants were unable to find there any consignee who could be notified of its arrival, or to whom it could be delivered. The defendants' agents immediately instituted a diligent inquiry, but they could not ascertain where the consignee or any other person entitled to have possession of the flour was to be found, or could be notified. At the time of its arrival at Wilmington

the public, for whose benefit they profess to act, and do act, in their respective callings." Per Pigot, C. B., in Waugh v. Denham, 16 Irish C. L. 405, 410 (1865).

"Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he has his privilege for the freight, even against the true owner of the goods, though they had been stolen (Pardessus, Droit Com. art. 961); and Valin (Comm. bk. 3, tit. 1, art. 11, 24) says that the contrary opinion is absurd." Per Lowell, J., in The Hyperion's Cargo, 2 Lowell, 93, Fed. Cas. No. 6,987 (1871).

To the effect that an innkeeper has a lien on stolen goods, see Abbot, C. J., in Johnson v. Hill, 3 Stark. 172 (1822); Black v. Brennan, 5 Dana, (Ky.) 310 (1837); Cook v. Kane, 13 Or. 482, 11 Pac. 226, 57 Am. Rep. 28 (1886); Beale on Innkeepers and Hotels, § 261.

[82] Parts of the opinion are omitted.

it was beginning to become sour, and would soon have greatly deteriorated in value. The defendants kept it on hand in store for about two months; and at the expiration of that time, being still unable to find either the owner or the consignee, and it being out of their power to procure a warehouse in which they could store it for a longer time, they caused it to be sold at public auction, and received the proceeds of the sale, which they have since retained in their possession.

Upon these facts, the plaintiff in the first place contends that as Williamstown was the place of destination of the flour under the directions which he gave to the Racine & Mississippi Railroad Company, and according to their agreement in the receipt given for it by them to him the defendants had no right to receive the flour at Groton, and were guilty of the unlawful conversion of it to their own use by transporting it thence to Wilmington; although in such reception and transportation of it over their road they acted in good faith, and strictly in conformity to the bills and directions which were made and given by the agents of the Racine & Mississippi Company, and by which it was regularly accompanied over each and all the lines and routes of the successive carriers.

The same person may be, and often is, not only a common carrier, but also the forwarding agent of the owner of the goods to be transported. Story on Bailm. §§ 502, 537. He must necessarily act in the latter capacity whenever he receives goods which are to be forwarded not only on his own line, but to some distant point beyond it on the line of the next carrier, or on that of the last of several successive carriers on the regular and usual route and course of transportation, to which they are to be carried and there delivered to the consignee. The owner generally does not and cannot always accompany them and give his personal directions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty, and invests him with authority to give the requisite and proper directions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place. For the first carrier can only transport the goods over his own portion of the line; and if he is not authorized to give the carrier with whose route his own connects directions in reference to their further transportation, they must stop at that point; for although, in general, every carrier is bound to accept and forward all goods which are brought and tendered to him, yet he is not so bound unless he is duly and seasonably informed and advised of the place to which they are to be transported. Story on Bailm. § 532; Judson v. Western Railroad, 4 Allen, 520, 81 Am. Dec. 718.

Hence it results by inevitable implication that when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several

successive carriers, he makes and constitutes the persons to whom he delivers them his forwarding agents, for whose acts in the execution of that agency he is himself responsible.[88] And therefore if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot in any sense be considered as wrongdoers, although they are carried to a place to which he did not intend that they should be sent. And in such case the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his own part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers. Stevens v. Boston & Worcester Railroad, 8 Gray, 266.

Applying these rules and principles to the facts developed in the present case, the conclusion is plain and inevitable. It is conceded by the plaintiff, and agreed by the parties, that the flour was carried by the Racine & Mississippi Railroad Company over their road, and was then delivered to the carrier with whose route their own connected, and was thence transported in strict compliance with and exactly according to the directions given by them and contained in the bills which they forwarded with and caused to accompany the flour over the whole route from Racine to Wilmington, by the several successive carriers, and among others by the defendants. The Racine & Mississippi Company were the duly constituted forwarding agents of the plaintiff; and as the defendants acted under their authority, they rightfully received the flour at Groton and carried it to Wilmington. And having under that authority paid all the freight which had accumulated in the whole course of the conveyance, including that which

[88] Acc. Glover v. Cape Girardeau R. Co., 95 Mo. App. 369, 69 S. W. 599 (1902), goods forwarded by roundabout route; Goodin v. So. Ry. Co., 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054 (1906), rate in excess of first carrier's guarantee; Thomas v. F. & C. Ry. Co., 116 Ky. 879, 76 S. W. 1093 (1903), rate in excess of first carrier's contract; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228 (1858), initial carrier contracted to deliver at destination, final carrier without notice held to have lien for his usual freight and for back freight paid to intermediate carrier, though in excess of contract rate.

"* * * We have seen that the Union Pacific and the Denver & Rio Grande Companies had entered into an agreement to disregard all directions requiring goods to go over other lines, and that, in pursuance thereof, all routing directions to the contrary were being ignored by both companies. * * * Under these circumstances we are of the opinion that the court below was warranted in finding that the possession of the property was not obtained in good faith by the defendant in the ordinary or usual course of business between connecting carriers, but that such possession was wrongful and illegal, and that the defendant was consequently not entitled to a carrier's lien upon the same, either for its own charges or those advanced to the former carrier, and therefore there was no error in entering judgment for plaintiff." Hayt, J., in Denver, etc., Co. v. Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376 (1889).

had been charged by the forwarding agent, up to the time when they received the flour, they were, as soon as it was conveyed to and deposited in their own freight house, entitled to a lien thereon for the entire freight thus paid and earned. And they cannot, either by the transportation of it under such circumstances over their own road, or by the detention thereof for the purpose of enforcing their lien upon it, be held to have unlawfully converted it to their own use.

This conclusion does not at all conflict with the decision in the case of Robinson v. Baker, 5 Cush. 137, 51 Am. Dec. 54 [ante, p. 288], upon which the plaintiff, in support of his position, chiefly relies. For there is an essential difference between the facts in the present and those which appeared in that case. * * * The service which the Old Clinton Line Company was to render was exclusively in their capacity as common carriers. They had only to carry the flour to Albany and there deliver it to Witt. They had no other duty to perform; no right to exercise any control over it for any other purpose. They were not, therefore, the forwarding agents of the plaintiff, nor invested by him with any authority to give directions as to further transportation of the flour, or to make any other disposition of it than its delivery to Witt. * * * But if they had been the forwarding agents of the owner he would have been responsible for their acts, and his consent to the diversion of the property from its intended route of transportation would have resulted by implication from their directions, and the respective carriers would then have become entitled to hold it under a lien to secure payment of the freight.

When the flour had been carried over their road to Wilmington and deposited at that place in their warehouse, the defendants had, as has been shown above, a lien upon it for all the freight which had been earned in its transportation from Racine. But this gave them only a right to detain it until they were paid; not to sell it to obtain the remuneration to which they were entitled. In the case of Lickbarrow v. Mason, 6 East, 21, it is said by the court that an owner may sell or dispose of his property as he pleases; but he who has a lien only on goods has no right to do so; he can only detain them until payment of the sum for which they are chargeable. And the rule which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all other persons having the like claim upon property in their possession. Jones v. Pearle, 1 Stra. 557; 2 Kent, Com. (6th Ed.) 642; Doane v. Russell, 3 Gray, 382. It is in distinct recognition of this principle that the Legislature have provided that when the owner or consignee of fresh meat, and of certain other enumerated articles liable soon to perish for want of care, shall not pay for the transportation and take them away, common carriers who have a lien thereon for the freight may sell the same without any delay, and hold the proceeds, subject to their own lawful charges, for the use of the owner.

And such also is the provision in relation to trunks, parcels, and passengers' effects left unclaimed at any passenger station of a railroad company for a period of six months after arrival and deposit therein. Gen. St. c. 80, §§ 1, 2, 5. This enumeration of particular cases, in which the right to sell and dispose of certain goods and chattels transported is conferred upon common carriers, operates, according to a familiar rule of law, as a denial or exclusion of their right in all other instances.

None of the provisions of the statute referred to extends to the case of flour transported in barrels as an article of merchandise. And therefore the defendants had no authority under the statute and no right at law to sell the flour which belonged to the plaintiff, although they had a valid and subsisting lien upon it, and were unable to find, after diligent inquiry, where the person to whom it ought to be delivered resided or had his place of business, and there was danger of its becoming worthless by longer detention of it in their warehouse. And consequently the sale which they made was an unlawful conversion of it to their own use which renders them liable in an action of tort to the owner, for its value, or rather for the value of all the right and interest which he at that time had in it, which is the merchantable value less the amount of the lien upon it. The plaintiff, therefore, may maintain this action, and is entitled to recover as damages the balance left after deducting from the sum which was the fair merchantable value of the flour at the time of the conversion the amount for which, upon the principles before stated, they had a lien upon it, with interest from the time of demand, or the date of the writ. And as the sale was unlawful, the expenses incurred in making it cannot be proved for the purpose of diminishing the damages which the plaintiff ought to recover.[84]

Judgment is therefore to be rendered for him. Unless the parties agree upon the amount, the cause must be sent to an assessor, or submitted to a jury if either party requires it, to assess the damages.

[84] Compare Butler v. Murray, ante, p. 129.

## CHAPTER II

## CHARACTER OF GOODS

### PIERCE v. WINSOR.

(District Court, D. Massachusetts, 1861. 2 Spr. 35, Fed. Cas. No. 11,151.)

The defendants chartered of the libelant the ship Golden City for a voyage to San Francisco, and then put her up as a general ship. A quantity of mastic was shipped on freight by the United States government from their works at New York to the fort at Fort Point, San Francisco. The mastic was in cakes, and was stowed in bulk in the run. Upon the arrival of the ship out, it was found that the mastic had run together and among the cargo, and had then hardened in one solid mass, adhering to the sides of the ship and to the cargo next to it. The damage done to the rest of the cargo, which was paid by the master on account of the ship, and the extra expense in breaking the mastic out with drills and chisels, amounted to from $1,700 to $2,000. Two other ships, the Dashaway and Fleet Wing, which sailed shortly after the Golden City, also had some mastic shipped in the same way, which arrived out in the same condition. These cargoes, with one other shipped in casks—after the news of the condition in which the earlier cargoes had arrived out had reached here—were all the cargoes ever shipped by the United States, or, so far as known by anybody, to San Francisco, or on any long voyage.

The article is manufactured by the United States government at New York, and is used on fortifications, and had been repeatedly shipped to the various forts on the Atlantic coast, and in the Gulf, and had always been shipped in bulk, without giving any indications that the heat in the hold of a vessel would, under any circumstances, affect it. This suit was brought by the owner of the ship against the charterers, to recover the damages sustained by him in payment to other shippers for injury to their goods and for the extra expense in discharging. It was not pretended that the defendants had any knowledge of the dangerous character of this article; and so far as any thing was known of the article, it was thought perfectly safe to ship it in this way. The libelant claimed to recover, upon the ground that there is always an implied contract, on the part of the charterer or general shipper of goods, that the goods shipped shall not be of a character dangerous to the ship and the residue of the cargo; and that the want of knowledge of the true character of the goods will not release such charterer or shipper of the goods from this responsibility.

SPRAGUE, District Judge. In Brass v. Maitland, 6 El. & Bl. 470,

the Chief Justice evidently took the view that the shipper of goods in a general ship impliedly contracts that the goods shipped shall not be injurious to other goods shipped in the usual course of lading a ship, and that this rule is not affected by the fact that the shipper had innocently shipped dangerous goods without knowledge of their true character. This principle is a sound one. It throws the loss upon the party who generally has the best means of informing himself as to the character of the article shipped. A different rule might encourage negligence on the part of the shipper, and even induce him to try experiments with articles unknown to commerce, if he could set up his ignorance of the real character of the articles as a defence to any damage caused by the shipment. This case is not between the shipper and the shipowner; but the rule applies equally well to the case of a charterer. He hires the whole ship, and has a right to put on board a full cargo, and he must not put on board goods which will injure the ship, and cause her owners to become responsible to other shippers for damage done.

Decree for libelant for money paid by him for other goods damaged, and for extra expense incurred in getting out the mastic.[1]

[1] Affirmed in the Circuit Court, 2 Cliff. 18, Fed. Cas. No. 11,150.

In Acatos v. Burns, L. R. 3 Ex. 282 (1878), shipowners unsuccessfully claimed damages caused by the heating of maize unfit for shipment by latent defect. Bramwell, L. J., said: "We might admit that Brass v. Maitland was correctly decided, and yet say that it does not govern this case. For the quality of the maize tendered for shipment was as much known to the one side as the other." Brett, L. J., said: "Neither Brass v. Maitland, nor any other case, shows that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of shipment."

## CHAPTER III

## DISPATCH AND DEMURRAGE

### JAMESON v. SWEENEY.

(City Court of New York, General Term, 1899. 29 Misc. Rep. 584, 61 N. Y. Supp. 498.)

FITZSIMONS, C. J. Though the bill of lading omits a demurrage clause, compensation in the nature of demurrage may nevertheless be recovered by the way of damages for any unreasonable detention of the vessel. Van Etten v. Newton (Com. Pl.) 6 N. Y. Supp. 531, 7 N. Y. Supp. 663, and 8 N. Y. Supp. 478, affirmed in 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630. The vessel in this instance was unreasonably delayed, and a liability followed.

The question is whether such liability rested exclusively on the consignee, as stated by the trial judge, or whether the owner has an option to sue either consignor or consignee, as claimed by the appellant. The trial judge dismissed the complaint on the ground that, according to certain evidence in the case, the discharging of the cargo was to be done by the consignee, and that consequently he, and not the freighter or consignor, was liable for the delay. Assuming this to be a correct statement of the law applicable to such a state of facts, the difficulty is that there was a conflict in the evidence on that subject; the plaintiff having testified that the agreement was that the defendants "were to load the stone and discharge it." If that question was at all material to the issue as to liability, it ought to have gone to the jury, that they might determine the dispute concerning it, and it was error to withhold the case from them.

Apart from this, it was held in Shaver v. Gillespie, 19 N. Y. Supp. 237, by the late court of common pleas at general term, that it is settled law that, though the bill of lading be silent as to lay days and demurrage, still the freighter is liable to the master of the vessel for damages for unreasonable delay in discharging the cargo after arrival. Failure to provide a safe berth, and a proper dock and customary facilities for unloading, is such negligence as imposes a responsibility for damages on the freighter. Under the rule laid down in this and kindred cases, it would seem that the freighter is liable for the demurrage caused by the delay in unloading, and that the question whether the consignor or consignee is to unload is a matter between them, which does not affect the rights of the owner or master of the vessel detained. We think the consignor became liable for the demurrage on the failure of the consignee to pay. The master did not agree

to do the unloading, nor find a suitable place therefor, and seems to have been guilty of no neglect concerning the same.

It follows that the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.[1]

[1] Acc. Erichsen v. Barkworth, 3 H. & N. 894 (1856); Fowler v. Knoop, 4 Q. B. D. 299 (1878).

"We think that delivering cargo is as much the duty of the shipowner as of the merchant, and consequently that the contract, implied by the law in the absence of any stipulation in a charter party, is that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge; the merchant being ready to receive in the usual manner, and the owner by his captain and crew to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time, if by reasonable diligence on the part of the merchant his cargo might be sooner taken away; and no contract implied by law on the part of the merchant to take the cargo out within such usual time, if he could not by reasonable diligence perform it, though very commonly there are stipulations to that effect." Blackburn, J., in Ford v. Cotesworth, L. R. 4 Q. B. 127, 133 (1868). Acc. Hick v. Raymond, [1893] A. C. 22; Empire Trans. Co. v. Phil. R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 (1896), discharge delayed beyond the usual time by strike of charterer's employés.

"Where the time for the discharge of the vessel is stipulated, or is definitely fixed by the charter or bill of lading, so that it can be calculated beforehand, the charterer thereby agrees absolutely to discharge her within that time, and he takes the risk of all unforeseen circumstances. 'He bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge (Randall v. Lynch, 2 Camp. 352), or from frost (Barret v. Dutton, 4 Camp. 333), or bad weather (Thiis v. Byers, 1 Q. B. D. 244), preventing access to the vessel, or from acts of the government of the place prohibiting export, or preventing communication with the ship (Barker v. Hodgson, 3 M. & S. 267; Bright v. Page, 3 B. & P. 295, note). And it is immaterial that the shipowner also is prevented from doing his part of the work within the agreed time, unless he is in fault.' Carver, Carriage by Sea, §§ 610, 611." Per Sanborn, J., in Empire Transportation Co. v. Phil. & R. Co., supra.

Charter parties often provide that the charterer's liability shall cease when the vessel is loaded, the shipowner to have a lien on the cargo for freight and demurrage. For the construction of the cesser clause as to a liability incurred before loading is finished, see Kish v. Cory, L. R. 10 Q. B. 553 (1875). As to a liability to which the lien does not extend, see Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106 (1900).

Laws of Oleron, art. 22: "A master freights a ship to a merchant, and it is devised between them, and a term is fixed for lading, and the merchant does not observe it, and also detains the ship and the mariners for the space of fifteen days or more, and sometimes the master loses his freight and his fine weather by default of the merchant; the merchant is bound to make compensation to the master, and of the compensation that is made the mariners shall have a fourth, and the master three parts, for the reason that he finds their expenses."

Consulate of the Sea, c. 190: "If merchants freight a ship and promise to the managing owner of the ship or vessel that they will despatch her by a certain day, and the contract has been made in writing or before witnesses, or has been written in the register book of the ship or vessel, and the managing owner of the ship and the merchants have shaken hands, and a penalty has been fixed, if the said merchants have not despatched the ship or vessel by that time, if the master of the ship wishes it, he may demand from them that penalty which shall have been fixed by agreement between them. And if no penalty has been fixed between the managing owner of the ship and the merchants, the managing owner of the ship may demand from the merchants all the expenses which he has incurred from their fault, saving always if an impediment of God or of the sea has prevented them, and he has remained

## JESSON v. SOLLY.

(Court of Common Pleas, 1811. 4 Taunt. 52.)

This was an action brought by the master of a vessel upon a general count in assumpsit for demurrage. Upon the trial, before Mansfield, C. J., at the sittings after Hilary term, 1811, it appeared that the plaintiff, who was master of a vessel, had taken on board a cargo, and signed bills of lading, deliverable to the order of the shipper, upon payment of freight, and at the bottom was a memorandum that the ship was to be delivered in 16 lay days, £8 per day demurrage to be paid for every laying day after the expiration of that time. * * *

When the vessel arrived, no bill of lading had arrived in this country; the defendant, who expected the cargo to be consigned to him, demanded the goods, which the plaintiff, having been apprised by another person that he also claimed the consignment, refused to deliver, unless either upon sight of the bill of lading, when it should arrive, indorsed to the defendant, or on receiving an indemnity. He also gave the defendant notice that, if the vessel was not delivered within the 16 lay days, he should insist on the demurrage. The bills of lading being delayed, the vessel was not completely delivered till 8 days after the expiration of the 16. The defendant paid the freight, but refused to pay the demurrage. He now objected, that he having demanded the goods, and offered to accept them, the vessel's delay was caused by the plaintiff's own fault, and therefore he was not entitled to recover, and Mansfield, C. J., being struck with the objection, nonsuited the plaintiff, with liberty to move to enter a verdict for the plaintiff for eight days demurrage.[2]

Shepherd, Serjt., had in Easter term obtained a rule nisi to set aside the nonsuit and enter a verdict for £64 for the plaintiff.

Lens, Serjt., in this term, showed cause.

MANSFIELD, C. J. This is quite a new case, arising from the new state of trade, and there is great weight in the observation made for the plaintiff, that many of these ships coming from a foreign country, to which they may never go again, put into their bill of lading a condition which enables them to look to the consignee for demurrage as well as for freight. My brothers are very clearly of opinion, that if the consignee will take the goods, he adopts the contract.

HEATH, J. It is clear the plaintiff is entitled to demurrage, either from the consignor or consignee. Demurrage is only an extended freight, and the consignee, by adopting this bill of lading, makes himself liable to demurrage as well as to freight.

through no fault of theirs, they are not bound to pay the managing owner of the ship the penalty above said and which has been agreed upon between them, nor indeed the expenses which the managing owner of the ship has incurred in the same matter."

[2] Part of the statement has been omitted.

CHAMBRE, J. It would be monstrous, if the consignee, accepting the contract with knowledge of the terms, should not be bound by it, and could send the captain back to the consignor for demurrage. Therefore the rule must be made absolute.[8]

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## BIRLEY v. GLADSTONE.

(Court of King's Bench, 1814. 3 Maule & S. 205.)

Assumpsit on the money counts. Plaintiff had a verdict subject to the opinion of the court upon a case stated in substance as follows: Defendants, owners of the ship Atlas, by charter party under seal covenanted with Holt for a voyage from Liverpool to ports in Russia and back, Holt to furnish a full cargo each way, 45 running days to be allowed for the discharge of the outward and loading of the return cargo, with a provision that Holt might keep the ship on demurrage beyond the 45 days at 15 guineas a day. When the vessel

[8] Acc. Dobbin v. Thornton, 6 Esp. 16 (1806); Harman v. Clarke, 4 Camp. 159 (1815); Huntley v. Dows, 55 Barb. (N. Y.) 310 (1864), damages for detention. See, also, Wegener v. Smith, 15 C. B. 285 (1854); Donaldson v. McDowell, Holmes, 290, Fed. Cas. No. 3,985 (1873); Crawford v. Mellor, 1 Fed. 638 (1880); Hawgood v. 1310 Tons of Coal (D. C.) 21 Fed. 681 (1884); Scholl v. Albany Co., 101 N. Y. 602, 5 N. E. 782 (1886); 275 Tons of Phosphate, 9 Fed. 209 (1881), buyer at marshal's sale; Garfield v. Fitchburg R. Co., 166 Mass. 119, 44 N. E. 119 (1896). But see Young v. Moeller, 5 E. & B. 755 (1855); Gage v. Morse, 12 Allen (Mass.) 410, 90 Am. Dec. 155 (1866). Compare Serraino v. Campbell, [1891] 1 Q. B. 283, demurrage at port of loading; Chappel v. Comfort, 10 C. B. (N. S.) 802 (1861), marginal clause, "There are eight days for unloading."

"The bills of lading, as already mentioned, provide only for 'paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed.' They do not mention demurrage, or refer to any provisions of the charter, other than those concerning freight and average. It is well settled that a bill of lading in such a form does not subject an indorsee thereof, who receives the goods under it, to any of those other provisions of the charter. It does not give him notice of, or render him liable to, the specific provisions of the charter, which require the discharge of a certain quantity of lumber per day, or, in default thereof, the payment of a specific sum for the longer detention of the vessel; but he is entitled to take the goods within a reasonable time after arrival, and is liable to pay damages for undue delay in taking them, according to the ordinary rules of law which govern in the absence of specific agreement." Gray, J., in Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106 (1900).

In Leer v. Yates, 3 Taunt. 387 (1811), bills of lading provided that the goods were "to be taken out in 20 days after arrival, or to pay £4 per day demurrage." Consignees of goods stowed at the bottom of the hold were prevented from taking them out by the delay of the consignees of the goods stowed on top. Mansfield, C. J., said: "It is impossible to decide these three very singular cases without being struck with the enormous gain which the owner may get by this bill of lading, and which may possibly much exceed what in justice and conscience he ought to have. This is a general ship; 30 or 40 persons may have goods on board, and for every one of them the owner may have his £4 per day."

Acc. Dobson v. Droop, M. & M. 441 (1830); Brett, L. J., in Porteus v. Watney, 3 Q. B. D. 534, 543 (1878).

was nearly loaded for her return voyage, Holt had become bankrupt and was indebted to his agent at the loading port. In consequence of proceedings begun by the agent, part of the cargo was removed by officers of the Russian government, and the ship delayed beyond the 45 days. On her arrival at Liverpool, plaintiff, who was Holt's assignee in bankruptcy, paid freight on the goods carried, but defendants would not deliver them unless payment was also made for detention of the vessel and for freight lost by the failure to load a full cargo and by the removal of cargo loaded. Plaintiff to obtain the goods paid under protest the amount demanded and brought this action to get his money back.

Lord ELLENBOROUGH, C. J.[4] I am clearly of opinion that no lien existed at the time of bringing this action, the only demand upon which a lien did exist, that is, on the cargo actually brought home, having been satisfied. Freight is only due at the common law for the regularly bringing of the goods to the place of destination, pursuant to the stipulations and terms of the charter party. If there be not a regular loading of the goods on the part of the freighter so as to give occasion to the earning of freight, that becomes the subject of dead freight, and is a claim to be made by the shipowner upon the covenant, or if the goods having been once regularly put on board, cause shall afterwards be given by the freighter, which prevents the freight from becoming due on them, in that case also it is a subject of claim under the covenant contained in the charter party. Here the question is not whether there be any remedy by action, but only whether there be the specific remedy of lien on the cargo. A great deal of argument has been very ingeniously rested on the clause which is to be found at the conclusion of the charter party, by which the parties "mutually bind and oblige themselves, especially the owners, the ship, her tackle and appurtenances, and the freighter, the goods and merchandizes, to be laden and put on board the ship on that voyage, each unto the other in the penal sum of £3,000." This is a mutual penalty, but if we are to consider the clause in the way of a lien, the remedy will not be mutual; it will stand thus, that the owner of the ship may detain the goods of the freighter as a security for the performance of covenants, but the freighter can never detain the ship, so that there will be no mutuality of lien between them. * * *

The clause is not familiar to us in England, but has been imported from Pothier. It is, like the charter party, I believe, of French origin, and I know not whether there may not be some immediate proceeding upon it in that country. * * * But it is absurd to imagine that this clause, which cannot be mutually obligatory, was intended to give a lien on one side without the like remedy on the other. Whatever benefit therefore is to be derived out of it, seems as if it must be de-

[4] The statement of facts has been rewritten, and parts of Lord Ellenborough's opinion omitted. Bayley, J., delivered a concurring opinion.

rived through the medium of a court of equity. There has been no remedy afforded under it in a court of law, and still less by means of actual lien; which is the act of the party. This is not freight earned within the terms of the charter party; it falls under the general covenants, either for demurrage or for providing a full cargo, but the party cannot have this suppletory remedy by way of lien. It would be going too far to hold that this clause gave him a lien for the nonperformance of covenants. If he had a lien, the consequence would be that the other party might obtain the goods clear of the lien by tendering the money; but he could not by so doing absolve himself from the nonperformance of covenants. * * *

LE BLANC, J. This is a question, not arising upon an action brought to recover the value of the goods from the shipowners, but upon an action brought by the assignee of the freighter to recover money paid by him to the shipowners under protest. With respect to the cargo which has been brought home there is not any question; because it is clear the shipowners were entitled to detain it, until the money due for freight was paid. As to that therefore there can be no doubt that the plaintiff is not entitled. The next question arises upon a claim for dead freight, or unoccupied space, whether the shipowners can detain the cargo actually brought home until they are satisfied in payment for a full cargo. And the next question arises upon a claim for demurrage. With respect to these two claims, I think that no question could have been made, had it not been for the concluding penal clause in the charter party; for without that, the case of Phillips v. Rodie, 15 East, 547, would have precluded the question. These two points therefore depend upon that clause.

There is only one more remaining question, which arises upon a claim made for freight, in respect of goods which were actually put on board in Russia, but taken out again by process conformably to the Russian law, in consequence of the charterer having failed in answering the bills drawn upon him. That question depends upon whether freight was earned in respect of them so as to entitle the shipowners to detain. The two points upon the claim for demurrage and dead freight have been fully discussed and explained by my Lord. It is impossible that this obligatory clause can be construed to mean that the owners of the ship should have a lien on the goods brought home, for every breach of covenant contained in the charter party, as for instance the not loading a full cargo and for demurrage. The remedy for such matters rests entirely in covenant. The clause could not mean to give the shipowners a lien. If such had been its intention it might easily have been expressed in a very few words, that the shipowners should have the right to detain the goods which should be brought home, until all their demands under the covenants were satisfied. Instead of this, the clause in question is introduced, not for the first time, the effect of which, whatever it may be, cannot be attained fully in a court of law. One strong argument against it is,

that one party cannot by possibility avail himself of the lien, I mean the owner of the goods cannot withhold the ship; and so I think the shipowners cannot avail themselves of this clause, to detain the goods until these specific sums are paid, or in other words, their demands under the covenants are satisfied. They must rest on the compensation to be obtained in damages for the several breaches of covenant.

As to the last point, I mean the claim in respect of those goods which were put on board and afterwards relanded and restored, I think the goods cannot be considered as having become liable to freight, because no freight was earned upon them. There is no case to show that freight has been considered as earned for goods merely put on board, and not carried home, but taken away, before any step made towards the performance of the voyage. It might be a breach of covenant to unload them, after they were once on board, and thereby prevent the party from acquiring his freight upon them, but freight cannot be considered as earned merely from the circumstance of the goods having been put on board. An action might lie against the party for misconducting himself, but I cannot consider that freight has been earned upon them, subject to the payment of which the shipowners are entitled to detain the goods actually brought home. Neither am I prepared to say that the freighter's agent abroad was to be considered as acting in respect of the relanding of the goods as agent for the freighter at home. He acted indeed as his agent in loading the goods, but hostilely to his employer afterwards, when he proceeded under the process of the courts in Russia, though what was done by him was in consequence of the act of his principal.

It seems to me impossible in any view of the case, in a court of law to consider that the shipowners are entitled to detain these goods for this sum of money claimed as freight. Consequently, the defendants are only entitled so far as freight is due to them on the first point. With respect to the other three sums of money, I think the plaintiff is entitled to recover.[5]

[5] Acc. Phillips v. Rodie, 15 East, 547 (1812); Nicolette Lumber Co. v. People's Lumber Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550 (1906), unreasonable detention.

MARITIME LIEN FOR DEMURRAGE.—A carrier by sea may proceed in admiralty by suit against his cargo to have it sold to satisfy a claim for stipulated demurrage or for damages from the detention of his vessel. This right, called a "maritime lien," is not dependent upon an agreement for a lien, a right of detainer, or, it seems, a personal claim against the consignee. It is not necessarily lost by delivery; but it may be relinquished by delivery, or defeated as against a consignee by giving a bill of lading whose terms are inconsistent with it. The Hyperion's Cargo, 2 Lowell, 93, Fed. Cas. No. 6,987 (1871); Pioneer Fuel Co. v. McBrier, 84 Fed. 495, 28 C. C. A. 466 (1897).

MEANING OF "DEMURRAGE."—In Gray v. Carr, L. R. 6 Q. B. 522 (1871), the charter party provided that 50 running days should be allowed the merchant for loading, "and 10 days on demurrage over and above the said laying days, at £8 per day," and that the carrier should have a lien on the cargo for all freight and demurrage. It was held that this did not give a lien for damages arising from the detention of the ship beyond the 10 days. Cleasby, J., said:

## CROMMELIN v. NEW YORK & H. R. CO.

(Court of Appeals of New York, 1868. 43[a] N. Y. 90, 1 Abb. Dec. 472.)

Action to recover possession of blocks of marble shipped to plaintiff over the line of defendant railroad company. Plaintiff had paid the freight. The trial judge in effect told the jury that defendant had a lien by reason of plaintiff's delay in taking the goods. Defendant had a verdict. The General Term ordered a new trial. Defendant appealed.[a]

HUNT, C. J. It is to be assumed, from the evidence and from the finding of the jury, that the plaintiff had received notice of the arrival of his marble. It is to be further assumed, although the evidence was contradictory on that point, that the plaintiff had been informed by the agent of the defendants, that a charge would be made for the detention of the cars longer than 48 hours. Had an action been brought to recover the damages or the agreed price for this detention, it would, upon these facts, have been sustainable.

The legal question here is, Had the defendants a lien upon the marble for the delay in taking it, which justified their refusal to deliver it? * * * In the present case the marble was not deposited in any warehouse or place of storage. The character of a warehouseman, or any liability for its protection or storage, after 48 hours, was expressly disclaimed by the defendants, in their notice of October 12th. It was never removed from the cars, but remained upon them in the public highway, until after the plaintiff had demanded its delivery to him. The defendants insist that by the goods being left upon their cars, and by the delay of the plaintiff to remove them within 48 hours after their arrival, injury, inconvenience, and expense was suffered by them. This is quite probable. It constitutes, however, a claim in the nature of demurrage, and does not fall within the principle of those transactions, which give a lien upon the goods. It is a breach of

"Now the word 'demurrage' has a known legal meaning, viz., the additional period during which the vessel may remain by agreement of the parties."

But in Lockhart v. Falk, L. R. 10 Ex. 132 (1875), the same judge said: "The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter party containing the clause in question we must collect what is the proper meaning to be assigned to it."

"Agreements for days on demurrage are now comparatively rare. The more usual plan is to fix a rate of 'demurrage' to be paid where the allowed time is exceeded; that is, where the contract is broken. But, further, the word is commonly used to denote all payments claimed for detention, whether the detention has been allowed by the contract or not, and whether the rate has been fixed or not." Carver, Carriage by Sea, § 648, note.

[a] The statement has been rewritten, and parts of the opinion of Hunt, C. J., have been omitted.

contract simply, for which, as in case of a contract in reference to pilotage or port charges, the party must seek his redress in the ordinary manner. Abb. on Shipp. 286; Birley v. Gladstone, 3 M. & S. 205 [ante, p. 301]. * * *

CLERKE, J., also expressed the opinion that the use of the cars while standing in the street was not storage, and gave no lien for the charge therefor.

A majority of the Judges concurred.

Order affirmed, with costs, and judgment absolute for plaintiff.[7]

[7] Acc. Chicago & N. W. Ry. Co. v. Jenkins, 106 Ill. 588 (1882); Burlington & M. R. Co. v. Chicago Lumber Co., 15 Neb. 390, 19 N. W. 451 (1884); Wallace v. B. & O. Co., 216 Pa. 311, 65 Atl. 665 (1907).

# CHAPTER IV

# COMPENSATION FOR EXTRAORDINARY SERVICES

## MILLER v. MANSFIELD.

(Supreme Judicial Court of Massachusetts, 1873. 112 Mass. 260.)

Tort for conversion of 100 barrels of flour. The evidence offered by defendant tended to show that he was an agent of the Housatonic Railroad Company, over whose line the flour had been shipped to plaintiff, that plaintiff allowed the flour to remain on the car for five days after notice of its arrival, and that defendant then refused to permit him to remove it, though tendered the freight, unless he also paid a charge of $2 a day for delay in unloading beyond 24 hours. Other facts are stated in the opinion. The court instructed the jury that there was no lien for the charge for delay in unloading, and plaintiff had a verdict. Exceptions.[1]

MORTON, J. For the purposes of this hearing, all the facts which the defendant offered to show are to be taken as established. We must assume, therefore, that there was an existing regulation and usage of the Housatonic Railroad Company that car loads of freight like that of the plaintiff's should be unloaded by the consignee within 24 hours after notice to him of their arrival, that for delay in unloading, after 24 hours, the consignee should pay $2 a day for each car belonging to other railroad companies, and that this regulation and usage was known to the plaintiff.

Being known to the plaintiff, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it. This charge is, in its essential character, a charge for storage. After the arrival of the goods at their destination the liability of the company as common carriers ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. Norway Plains Co. v. Boston & Maine Railroad, 1 Gray, 263, 61 Am. Dec. 423. The parties, by their agreement, fixed the rate of compensation which the company should receive and the time when it should commence. It is not material that the goods remained in the cars instead of being put into a storehouse. The responsibility of the

[1] The statement of facts has been rewritten.

company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid.

We are of opinion, therefore, that instructions should have been given substantially as requested by the defendant, and that the presiding judge erred in the instructions which he gave.

Both parties have assumed that the question involved in the case is the same as if the suit had been directly against the railroad company, and we have, therefore, so treated it.

Exceptions sustained.[2]

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## CARGO ex ARGOS.

**(Privy Council, 1873. L. R. 5 P. C. 134.)**

Action in admiralty for freight, demurrage, and expenses against 147 barrels of petroleum. The plaintiff owned the steamship Argos, and employed her with other ships in trade between London and ports in the north of France. Defendant shipped the petroleum on the Argos under a bill of lading by whose terms it was to be delivered at Havre to his order. The vessel sailed for Havre with a general cargo, but on arrival the authorities compelled her to leave the port because of the petroleum; France being then at war with Germany and munitions of war lying about the quay. Her master took her to Honfleur and to Trouville, but was compelled for the same reasons to leave those ports. He then returned to Havre and obtained permission to discharge the petroleum into a lighter in the outer harbor and the rest of the cargo at the quay, which was done. When the Argos was ready to return to London, the petroleum had been four days on the lighter, ready for delivery, but no one had appeared to take it. The master reloaded it and brought it back to London. The amounts claimed in the action included the bill of lading freight to Havre of £24. 4s., an equal sum as freight back to London, the hire of the lighter at Havre, extra coal consumed, and other expenses incurred in going into Honfleur and Trouville, and demurrage at the bill of lading rate for time so lost. The trial judge allowed the claim in full.[3]

Sir MONTAGUE E. SMITH. * * * It can scarcely be contended

[2] Acc. Miller v. Ga. R. Co., 88 Ga. 563, 15 S. E. 816, 18 L. R. A. 823, 30 Am. St. Rep. 170 (1891); Norfolk & W. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916 (1894); Gulf City Co. v. Louisville & N. R. Co., 121 Ala. 621, 25 South. 579 (1899); Darlington v. Mo. Pac. Ry. Co., 99 Mo. App. 1, 72 S. W. 122 (1902); Schumacher v. C. & N. Ry. Co., 207 Ill. 199, 69 N. E. 825 (1904), and cases cited 22 L. R. A. 530, note. And see Ky. Wagon Mfg. Co. v. Ohio & M. R. Co., 98 Ky. 152, 32 S. W. 995, 36 L. R. A. 850, 56 Am. St. Rep. 326 (1895).

[3] The statement of facts has been rewritten, and parts of the opinion omitted.

that the master would have been justified, when he found the petroleum could not be landed, in at once leaving the port without waiting a reasonable time to give to the defendant an opportunity of receiving it there. He might, even if the prohibition had not existed, have desired to send the goods to Rouen or elsewhere by water, instead of landing them. Their Lordships, therefore, think that the means of performing the contract were not exhausted, nor the contract dissolved, when it was found the ship could not be discharged at the quay and the cargo landed, and that they ought to hold that, the master being ready and able to give delivery in the harbor, and having kept the goods a reasonable time there for the purpose, the freight has been earned. * * *

The next question to be considered is whether the plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. It seems to be a reasonable inference, from the facts, that after the four days during which the petroleum had been lying in the harbor had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the defendant in bringing it back to England. Whether he was so justified is the question to be considered.

As pointed out by the judge of the Admiralty Court, the same kind of question arose in Christy v. Row, 1 Taunt. 300. In that case Sir James Mansfield says: "Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision, which I have been able to find, determines what shall be done in case the voyage is defeated. The books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary. I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandise, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided."

The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined, amongst others, Tronson v. Dent, 8 Moore, P. C. 419; Notara v. Henderson [ante, p. 73]; Australasian Navigation Company v. Morse, L. R. 4 P. C. 222. It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be

placed, and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.

Most of the decisions have related to cases where the accident happened before the completion of the voyage; but their Lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that, if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and, if so, it will follow from established principles that the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the defendant, and that they were brought back at less charge in the Argos than if they had been sent in another ship. If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise. But, in the present case, their value, of which the defendant has taken the benefit by asking for and obtaining the goods, far exceeded the cost.

The authority of the master, being founded on necessity, would not have arisen, if he could have obtained instructions from the defendant or his assignees. But under the circumstances this was not possible. Indeed this point was not relied on at the bar.

Their Lordships, for the above reasons are of opinion that the plaintiff has made out a case for compensation for bringing back the goods to England.

But they think the plaintiff is not entitled to recover the amount claimed for demurrage and expenses in attempting to enter the ports of Honfleur and Trouville. These efforts may have been made by him in the interest of the cargo as well as the ship; but they were made before the ship was ready to deliver at all in the port of Havre, and the expenses of this deviation and of the return to Havre, after permission had been obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the defendant.

The charges for the hire of the vessel and of storing the petroleum in her at Havre, after permission had been obtained for its discharge there, stand on different ground. If the ship had then waited in the outer harbor with the petroleum on board, the defendant would

have been liable to pay demurrage at £10. 10s. a day. It was obviously, therefore, to his advantage under the circumstances for the master to hire the vessel, and thus relieve him from the heavy demurrage payable for the detention of the ship. The whole expense of this operation appears to be about £15 only.

In the result their Lordships think the plaintiff is entitled to recover the outward freight, and the charge made for the carriage back to England, together £48. 8s., and also the £15 for the above expenses at Havre, in all £63. 8s.[4] * * *

[4] As to a carrier's right to reimbursement for expenses incurred in behalf of the goods, see Thurston v. More, 2 Select Pleas in Ct. of Admiralty, 99 (1557); Hingston v. Wendt, 1 Q. B. D. 367 (1876), has lien for expense of preserving goods after wreck of vessel; Gt. No. Ry. Co. v. Swaffield, L. R. 9 Ex. 132 (1874), keep of horse refused by consignee; Payne v. Ralli (D. C.) 74 Fed. 563 (1896), putting cargo defectively packed into condition for delivery; Guesnard v. L. & N. R. Co., 76 Ala. 453 (1884); Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397 (1904), has lien for customs duties paid; Western Trans. Co. v. Hoyt, ante, p. 266, payment of prior carrier's charges; Bissel v. Price, 16 Ill. 408 (1855), payment of charges of shipping agent. And see Notara v. Henderson, ante, p. 73, and p. 128, note. The right of reimbursement may exist, though the charge paid was not a valid claim. Bowman v. Hilton, 11 Ohio, 303 (1842); Knight v. Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46 (1882), payment of prior carrier's freight uncollectible because of hidden damage to goods; White v. Vann, 6 Humph. (Tenn.) 70, 44 Am. Dec. 294 (1845). payment of charges of shipping agent usual, but unauthorized.

In Wabash v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397 (1904), Brewer, J., for the court, quoted the following passage from Overton on Liens, § 135: "The lien attaches, not alone for the particular item of charge for carriage due upon the goods, but for such other legal charges as the carrier in the course of his duty may have been compelled to expend upon their care, custody and preservation. As when a railway, in the transportation of live stock, as cattle, horses, and swine, has been at the expense of labor and money in feeding and preserving them, such expense is a legitimate charge in addition to their transportation. For the carrier is under special obligation to guard and protect such property, hence the propriety of a lien for such extraordinary expense and care."

# PART IV

# THE EXCEPTIONAL LIABILITY OF A COMMON CARRIER

## CHAPTER I

## LIABILITY FOR DAMAGE OR LOSS IN THE CARRIAGE OF GOODS

### WOODLIFE'S CASE.

**(Court of Queen's Bench, 1596. Owen, 57.)**

In an account the plaintiff declared, that he delivered goods to the defendant to merchandise for him; the defendant said, that the goods with divers other of his own proper goods were taken at sea, where he was robbed of them. And it was moved that this was no plea in bar of an account, but, if it be any plea, it shall be a plea before auditors in discharge; but admitting it be a good bar, yet it is not well pleaded, for the plaintiff as it is pleaded cannot traverse the robbing and try it, for things done super altum mare are not tryable here, wherefore the defendant ought to have pleaded that he was robbed at London, or any other certain place upon the land, and maintain it by proofs that he was robbed on the sea.

GAWDY. It is no good plea, for he hath confest himself to be accountable by the receipt, 9 Edw. IV, and it is no plea before auditors, no more than the case was in 9 Edw. IV, for a carrier to say that he was robbed.

POPHAM. It is a good plea before auditors, and there is a difference between carriers and other servants and factors; for carriers are paid for their carriage, and take upon them safely to carry and deliver the things received.

GAWDY. If rebels break a prison, whereby the prisoners escape, yet the gaoler shall be responsible for them, as it is in the 33 Hen. VI.[1]

POPHAM. In that case the gaoler hath remedy over against the rebels, but there is no remedy over in our case.

GAWDY. Then the diversity is when the factor is robbed by pyrates, and when by enemies.

POPHAM. There is no difference.

[1] The Marshal's Case, post, p. 357, note.

## MORSE v. SLUE.

(Court of King's Bench, 1671. 1 Vent. 190, 238.)

An action upon the case was brought by the plaintiff against the defendant; and he declared, that whereas, according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or substraction, ita quod pro defectu of them, they may not come to any damage; and whereas the 15 of May last, the defendant was master of a certain ship called the William and John, then riding at the port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pair of silk stockings and 174 pounds of silk, by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, etc., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, 17 May, the same were totally lost out of the said ship.

Upon not guilty pleaded, a special verdict was found, viz.:

That the ship lay in the river of Thames, in the port of London, in the parish of Stepney, in the county of Middlesex, prout, etc. That the goods were delivered by the plaintiff on board the ship, prout, etc., to be transported to Cadiz in Spain. That the goods being on board, there were a sufficient number of men for to look after and attend her, left in her. That in the night came eleven persons on pretence of pressing of seamen for the king's service, and by force seized on these men (which were four or five, found to be sufficient as before) and took the goods. That the master was to have wages from the owners, and the mariners from the master. That she was of the burthen of 150 tons, etc.

So the question was, upon a trial at bar, whether the master were chargeable upon this matter?

[Maynard insisted upon it: That the master was not chargeable; Say they, he is chargeable whilst he is here, but when he is gone out of the realm he is not chargeable, though the goods be taken from him. Which distinction, he said, had no foundation in law. HALE, C. J. It will lie upon you that are for the defendants, to show a difference betwixt a carrier and the master of a ship. And it will lie upon you that are for the plaintiff, to show why a master of a ship should be charged for a robbery committed within the realm, and not for a piracy committed at sea. It was urged by Mr. Holt for the plaintiff: That a hoyman and ferryman are bound to answer, and why not the master of a ship? The defendant proved: That there was no carelessness nor negligent default in him. Maynard. He is not chargeable, if there be no negligence in him, because he is but a servant, the

owner takes the freight. HALE, C. J. He is exercitor navis. If we should let loose the master, the merchant would not be secure. And if we should be too quick upon him, it might discourage all masters; so that the consequence of this case is great.] [1]

The case was argued two several terms at the bar, by Mr. Holt for the plaintiff, and Sir Francis Winnington for the defendant, and Mr. Molloy for the plaintiff, and Mr. Wallop for the defendant; and by the opinion of the whole court, judgment was given this term for the plaintiff.

HALE, C. J. delivered the reasons as followeth.

First, by the admiral civil law the master is not chargeable pro damno fatali, as in case of pirates, storm, etc., but where there is any negligence in him he is.

Secondly. This case is not to be measured by the rules of the admiral law, because the ship was infra corpus comitatus.

Then the first reason wherefore the master is liable is, because he takes a reward; and the usage is, that half wages is paid him before he goes out of the country.

Secondly. If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens.[2] There was a case (not long since) when one brought a box to a carrier, in which there was a great sum of money, and the carrier demanded of the owner what was in it; who answered, that it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there were money in it, he durst not take charge of it; and the owner had answered as before, this matter would have excused the carrier.

Thirdly. He which would take off the master in this case from the action must assign a difference between it and the case of a hoyman, common carrier or innholder.

'T is objected, that the master is but a servant to the owners.

Answer. The law takes notice of him as more than a servant. 'T is known, that he may impawn the ship if occasion be, and sell bona peritura; he is rather an officer than a servant. In an escape the jailer may be charged, though the sheriff is also liable, for respondeat superior. But the turnkey cannot be sued, for he is but a mere servant; by the civil law the master or owner is chargeable at the election of the merchant.

'T is further objected, that he receives wages from the owners.

[1] This passage is taken from the report in 1 Mod. 85.

[2] "The defendant proved * * * that four is as many as are usually kept on board at half pay because freight comes in slowly." Mors v. Slew, 2 Keble, 866 (1671). "* * * When he took in the goods he might have cautioned against them not to take them in till farther time." Mors v. Slew, 3 Keble, 135 (1672).

Answer. In effect the merchant pays him, for he pays the owners freight, so that 't is but handed over by them to the master; if the freight be lost, the wages are lost too, for the rule is, freight is the mother of wages: therefore, though the declaration is, that the master received wages of the merchant, and the verdict is, that the owners pay it, 't is no material variance.

Objection. 'T is found, that there were the usual number of men to guard the ship.

Answer. True, for the ship, but not with reference to the goods, for the number ought to be more or less as the port is dangerous, and the goods of value, 33 H. VI, 1. If rebels break a jail, so that the prisoners escape, the jailer is liable; but is otherwise of enemies; so the master is not chargeable where the ship is spoiled by pirates. And if a carrier be robbed by an hundred men, he is never the more excused.[4]

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HOLT, C. J.,[5] dissenting, in LANE v. COTTON, 12 Mod. 472 (1701): "For what is the reason that a carrier or innkeeper is bound to keep such goods, as he receives, at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such opportunity, as they have by the trust reposed in them, to cheat all people, they would be so apt to play the rogue and cheat people without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them that the inconveniency would be very great. And though one may think it a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable, if it were not so; for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. And this is the reason of the civil law in this

[4] "The liability of the shipowner as carrier for loss by thieves, which was discussed at Westminster in 1671, was treated as clear law in admiralty so early as 1640, and probably earlier." R. G. Marsden, in Select Pleas in the Court of Admiralty, vol. 2, p. lxxx.

CONSULATE OF THE SEA, c. 22.—Goods which have been once put on board and are inscribed in the ship's book, if they are lost whilst in the ship, the managing owner of the ship ought to make compensation for the goods.

"If a Master shall receive Goods at the Wharf or Key, or shall send his Boat for the same, and they happen to be lost, he shall likewise answer both by the Marine Law and the Common Law. * * * He must not suffer the Lading to be stolen or imbezzled; if the same be, he must be responsible, unless it be where there is vis major; as if he be assaulted at Sea either by Enemies, Ships of Reprize, or Pirates, there, if no fault or negligence was in him, but that he performed the part of an honest, faithful, and valiant man, he shall be excused." Molloy, De Jure Maritimo, bk. II, c. 2, §§ 2, 8.

[5] See ante, p. 16, note.

case, which though I am loathe to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things. Vide Just. Inst. lib. 4, tit. 5, de lege.[6] And all this may be though the common law be time out of mind. * * * And the diversity between the case of a common carrier and this, upon account of the carrier's having a remedy against the hundred if he be robbed; it is none at all in the reason of the thing, for before that remedy was given, which was only by the statute of Winchester, the action did lie against him; and yet he had no remedy but against the robbers if he could catch them."

[6] The liability under the Roman law of a carrier by sea is illustrated by the following passages.

DIGEST, BOOK 4, TIT. 9: "Saith the Praetor—As for shipmasters, innkeepers and stablemen, in respect to that which they receive from anyone into their keeping, unless they return it, I will give judgment against them. (Ait Praetor—Nautæ, caupones, stabularii quod cuiusque salvum fore receperint, nisi restituent, in eos judicium dabo.)"

(Ulpian, L. 14) I, § 1: "This edict is of very great use because it is necessary to put full faith in them and to commit things to their guard. Let no one think this harshly decreed against them, for it is in their own choice not to receive a thing; and unless this were decreed, opportunity would be given of contriving with lawless men against those whom they receive, since they do not even now abstain from fraud of this sort."

§ 8: "* * * And I think that he [the shipmaster] takes into safe keeping all those things that are brought into the ship, and ought to be liable not only for the acts of the sailors but of the passengers."

III, § 1: "* * * And by this edict, he who receives is bound absolutely, although it is without his fault that the thing perishes or is damaged unless it happen by damnum fatale. Concerning this Labeo writes that if anything perishes by shipwreck or by the violent acts of pirates, it is not unjust that he should be allowed a defence. The same thing may be said if either in a stable or in an inn vis major occurs."

SOHM'S INSTITUTES OF ROMAN LAW, § 83 (LEDLIE'S TRANSLATION [2D ED.] P. 427): "A shipowner, innkeeper or stable keeper who takes charge of property belonging to a traveller, is answerable for such property in like manner as though he had concluded an express contract to that effect. This liability was first introduced by the praetor. If the property in question is lost or injured the traveller can sue for full damages by the actio de recepto, unless, indeed, the defendant (the shipowner, etc.) can prove that the loss was caused by the traveller's own negligence or by an unavoidable accident (vis major)."

COCKBURN, C. J., in NUGENT V. SMITH, 1 C. P. D. 423 (1876): "In the first place, it is a misapprehension to suppose that the law of England relating to the law of common carriers was derived from the Roman law; for the law relating to it was first established by our Courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward. In the second place, the Roman law made no distinction between inevitable accident arising from what in our law is termed the 'act of God' and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from 'casus fortuitus,' or, as it is also called, 'damnum fatale,' or 'vis major'—unforeseen and inevitable accident. * * * Such is the Roman law, and such is the existing law of all the nations which have adopted the Roman law—France, Spain, Italy, Germany, Holland, and to come nearer home, Scotland."

HOLT, C. J., in COGGS v. BERNARD (Court of Queen's Bench, 1703) 2 Ld. Raym. 909: "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. II, in the case of Mors v. Slew, Raym. 220, 1 Vent. 190, 238 [ante, p. 313]. The law charges this person, thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, etc., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor."

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## PROPRIETORS OF THE TRENT NAVIGATION v. WOOD.

**(Court of King's Bench, 1785. 3 Esp. 127.)**

This was an action of assumpsit.

The declaration stated that the plaintiffs, as proprietors of the Trent Navigation, undertook to carry the defendant's goods from Hull to Gainsborough; that in the river Humber; the vessel on board which the defendant's goods were, sunk, by driving against an anchor in the river; and the goods were, in consequence of the accident, considerably damaged. That the plaintiffs repaired the damage the goods

had sustained, and sent them home to the defendant; and the breach was, that the defendant refused to pay the money the plaintiffs had expended in the recovery of the goods. There was also a count in the declaration for money had and received, which was for freight. At the trial the plaintiffs were nonsuited.

A rule having been obtained, to show cause why the nonsuit should not be set aside, it came on to be argued on this.

Lord MANSFIELD. This is certainly a sea voyage. It is a general question, and no case has been cited exactly in point; but it is clear that the carrier is liable in all cases, except for accidents happening by the act of God or by the king's enemies. The act of God is a natural necessity, and inevitably such, as winds, storms, etc. The case of a robbery is certainly very strong, but not a natural necessity; and in this case there is an injury by a private man, within the reason of the instance of robbery; yet I think the carriers ought to be liable. There is some sort of negligence here; for as the buoy could not be seen, there should have been, on that account, a greater degree of caution used.[7]

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## FORWARD v. PITTARD.

**(Court of King's Bench, 1785. 1 Term R. 27.)**

This was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:

"That the defendant was a common carrier from London to Shaftsbury. That on Thursday the 14th of October, 1784, the plaintiff delivered to him on Weyhill 12 pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road waggon, which travels from London through Andover to Shaftsbury. That by the course of travelling, such waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

N. Bond, for the plaintiff.[8]

[7] Ashhurst and Buller, JJ., concurred in separate opinions. Willes, J., also concurred.

[8] His argument, and parts of the argument of Borough for the defendant, are omitted.

Borough, for the defendant, observed that the point in this case was not before the court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. Rich v. Kneeland, Cro. Jac. 330; Hob. 17, 5 Burr. 2827.

In Vid. 27: The declaration, in an action against a waterman for negligently keeping his goods, states the custom relative to carriers thus, "absque substractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut prefertur deliberata, non sint perdita, amissa, seu spoliata." It then states the breach, that the defendant had not delivered them, and "pro defectu bonæ custodiæ ipsius defendentis et servientium suorum perdita et amissa fuerunt." In Brownl. Red. 12, the breach in a declaration against a carrier is, "defendens tam negligenter et improvide custodivit et carriavit," etc. In Clift. 38, 39, Mod. Intr. 91, 92, and Herne, 76, the entries are to the same effect. In Rich and Kneeland, Hob. 17, the custom is stated in a similar way; and in the Exchequer Chamber it was resolved, "that though it was laid as a custom of the realm, yet indeed it is common law." On considering these cases, it is not true that "the act of God and of the king's enemies" is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it; but the act of God and of the king's enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in Coggs v. Bernard, 2 Ld. Raym. 909, where this doctrine was first laid down; but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say, that cases falling within the reasoning of what are vulgarly called "acts of God" should not also be good defences for a carrier. [Counsel then quoted from the opinion of Lord Holt, ante, p. 317.] As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say that a carrier was also liable in cases of accidents, where neither combination nor negligence can possibly exist.

It appears from the Doctor and Student (Dial. 2, c. 38, p. 270) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. * * * In all the cases to be found in our books, may be traced the true ground of liability, negligence. If the law were not as is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of Morse v. Slue, 1 Vent. 190, 238 [ante, p. 313], came on repeatedly before the court, and created very considerable doubts. * * *

However, if the court should be of opinion that the carrier is answerable for every loss, unless occasioned by the act of God or the king's enemies, he then contended that, as the act of God was a good ground of defence, this accident, though not within the words, was within the reason, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, etc., are the immediate acts of the Almighty; they are permitted, but not directed by him. The reason why these accidents are not held to charge a carrier, is, that they are not under the control of the contracting party, and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. * * *

It is expressly found, in the present case, that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human penetration.

Bond, in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for everything is negligence which the law does not excuse, 1 Wils. 282. And the question here is, is this a case which the law does excuse? In Goffe v. Clinkard, cited in Wils. 282, there was all possible care on the part of the defendants. The judgment in the case of Gibbon v. Peyton and another, 4 Burr. 2298, which was an action against a stagecoachman for not delivering money sent, is extremely strong. There Lord Mansfield said (4 Burr. 2300): "A common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. IV, pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery; but a carrier insures. 1 Ventr. 190, 238. Sir T. Raym. 220, s. c. 1 Mod. 85. * * *

Lord MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. Cur. adv. vult.

Afterward Lord MANSFIELD delivered the unanimous opinion of the court.

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm—that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.*

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## BANK OF ORANGE v. BROWN.

(Supreme Court of Judicature of New York, 1829. 3 Wend. 158.)

Demurrer to plea in abatement. The declaration contains nine counts. The first count states that the defendants were the owners of a certain vessel or steamboat called the Constellation, whereof R. G. Cruttenden was master, used and navigated upon the Hudson river, between the cities of New York and Albany, for the conveyance and transportation of goods and chattels for hire and reward, touching on her passages up and down the river at the village of Newburgh, for the landing and delivery of freight, goods and chattels;

* For the history of the rule imposing strict liability upon a common carrier, see Professor Beale, 11 Harv. L. R. 158. Compare Holmes, The Common Law, pp. 180–205.

that the plaintiffs, to wit, the president, directors and company of the Bank of Orange County, on the 15th November, 1827, at the city of New York, caused to be delivered to the captain a parcel of bank notes of the value of $11,250, to be safely and securely carried and conveyed in the said vessel or steamboat from the city of New York to the village of Newburgh, and there to be delivered to one William Phillips, for certain freight and reward; and the said master then and there took and received the same for the purposes aforesaid; and although the said vessel or steamboat on the same day safely arrived at Newburgh, and no dangers of the seas, nor the act of God, nor the enemies of the people, etc., prevented the safe carriage of the said bank notes, yet the plaintiffs averred that the said defendants, or their said agent, not regarding their duty in that behalf, but contriving, etc., to deceive and defraud the plaintiffs, did not deliver the said bank notes to the said William Phillips, but so negligently, carelessly and improperly conducted the carriage and conveyance thereof, that for want of due care in the defendants, their servants and agents, the said bank notes were wholly lost to the plaintiffs. The second count states that the defendants were common carriers of goods and chattels, according to the custom of the state, and that the bills were delivered to them to be carried from New York to Newburgh, for certain freight and reward; that although the vessel arrived, the bills were not delivered, but were lost for the want of due care, and through the negligent, careless and improper conduct of the defendants, their servants and agents. The third, sixth and eighth counts are substantially like the first, and the fourth, fifth and seventh counts are like the second count. The ninth count is in trover. To the ninth count, the defendants pleaded the general issue, and to the first eight counts they put in a plea in abatement, that on the day in the said several counts of the declaration mentioned, 54 other persons (naming them), together with the 6 defendants, were joint owners and proprietors of the vessel or steamboat in the declaration mentioned; and that if any such injury happened as is complained of in the said several counts, the said 54 persons are jointly liable with the defendants for the same, as such joint owners and proprietors, etc. The plaintiffs demurred to the plea in abatement, and the defendants joined. * * *

SAVAGE, C. J.[10] * * * The plaintiffs have demurred, and the question presented for adjudication is, whether it is necessary to join all the joint owners in this suit?

It is not denied, that in an action against joint contractors as such, all must be joined; and if the action be brought against a part only, those who are sued may plead in abatement the nonjoinder of the other joint contractors. Nor is it denied that, in an action for a tort, the plaintiff may prosecute all or any portion of those concerned in such tort. But an action on the case against common carriers, upon

[10] Part of the statement of facts and parts of the opinion are omitted.

the custom of the realm, seems in England not to be considered always as belonging entirely to the class of actions arising ex contractu, nor to those arising ex delicto, but is said sometimes to be a case arising ex delicto quasi ex contractu.

Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation. No special agreement is necessary to enable the owner to maintain assumpsit against the carrier for breach of his duty, nor to enable the carrier to maintain assumpsit for his compensation. There is, therefore, a perfect contract implied between the carrier and his employer. As this contract is implied by law, so also where any person becomes a common carrier by professing to carry for all persons indifferently, the law imposes upon him duties and liabilities arising out of his public employment, and imposes upon the employer the liability of making compensation. Considerations of public policy, and not agreements between the parties, have ascertained the duties and fixed the limits of the liability of common carriers; and for any omission or neglect of duty, an action lies without stating any consideration of contract between the parties; for the negligence is the cause of the action, and it is not necessary to state or rely upon an assumpsit. * * *

The form of action against a common carrier, is a question which has been considerably agitated in the English courts, and has been different as the gravamen was supposed to arise upon a breach of public duty, or the breach of mere express promise. Each form has its advantages and disadvantages. If assumpsit is brought, or the action be laid as arising upon contract, it may be abated for the nonjoinder of proper parties; but it survives against the personal representative, and the common counts may be joined in the declaration. If the action be laid as arising ex delicto, and founded on the custom, the suit does not abate for the non-joinder of all the proper parties; and in a proper case, a count in trover may be joined. "The present usage," says Mr. Jeremy, in his Law of Carriers, p. 117, "sanctions the principles and adopts the advantages of both forms of action, by permitting the cases to be considered either way, as arising ex contractu or ex delicto, according as the neglect of duty or breach of mere express promise is meant to be relied upon as the cause of injury." Mr. Chitty supposes the plaintiff has his choice of remedy (1 Chitty's Pl. 75, 6), and that in an action founded upon the custom, no advantage can be taken of the nonjoinder of defendants, and refers to the cases which were cited upon the argument. He has given precedents of declarations both ways (2 Chitty, 117 and 271, 2); according to which, the declaration in this case is clearly founded upon the negligence of the defendants, and not upon an express promise.

[The learned judge then reviewed several English cases.]

The case of Bretherton v. Wood (1821) 3 Brod. & Bing. 54, was a writ of error in the Exchequer Chamber. Wood, the plaintiff below, sued ten defendants, as proprietors of a stage coach, for injuries he had received by being upset by careless driving, while he (the plaintiff) was a passenger. At the trial, the jury found two of the defendants not guilty, and a verdict against the others, on which the king's bench rendered judgment; and for this cause error was brought into the Exchequer Chamber. On the argument, all the preceding cases, and some others, were cited. Dallas, Chief Justice of the Common Pleas, delivered the judgment of the court. He said it had been contended that the declaration was upon contract, and he admitted, if it were so, all the joint contractors must be made defendants; but the court thought that rule applicable to cases where it was necessary to shew a contract on trial. "This action is on the case against a common carrier upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law." "A breach of this duty is a breach of the law; and for this breach, an action lies founded on the common law, which action wants not the aid of a contract to support it." The action of assumpsit, he admits, would lie; but it was of recent use to an action on the case, which was as old as the law itself. He considered this action as founded on a breach of duty depending on the common law, on a tort or misfeasance; and was therefore several as well as joint. He considered the cases of Powell v. Layton (1806) 5 Bos. & Pul. 365, and Max v. Roberts (1810) 12 East, 89, as founded upon a particular contract, and therefore not in the way. He concludes by saying: "At present it is sufficient to say that this action is founded on a misfeasance, and that the declaration is framed accordingly; and therefore that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed."

These are all the cases necessary to be noticed; and I hope this short review of them may elucidate the subject.

It is not to be denied that there has been a difference of opinion between some of the English judges on the question whether an action against a common carrier is an action founded on a tort or on a contract. Dallas, Chief Justice, seems to put that question at rest, by bringing it to a very fair test: Does it require the plaintiff to shew a contract, express or implied, to support it? The action on the case was at last decided to be for a tort or misfeasance. This was clearly the opinion of Lord Mansfield in the case cited by Chief Justice Mansfield; and all the cases in which it has been held necessary to join all the joint owners have been said by distinguished judges to be clearly actions upon a promise. Much of the confusion has probably grown out of the forms of declaring in some of the cases, where it is difficult to determine whether the promise and undertaking often stated in the count, or the custom of the realm, also stated, is intended by the pleader to be the foundation of the action.

I apprehend the true rule now is that an action solely upon the custom is an action of tort; that, in such action all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be sued, and judgment may be rendered on a verdict against all or a part only of those against whom the action is brought; the plaintiff has his choice of remedies, either to bring assumpsit or case; and that when one or the other action is adopted, it must be governed by its own rules. But if the plaintiff states the custom, and also relies on an undertaking general or special, as in Boson v. Sandford, 2 Show. 478, and some others, then the action may be said to be ex delicto quasi ex contractu, but in reality is founded on the contract, and to be treated as such.

In Allen v. Sewall, 2 Wend. 338, in giving the opinion of the court, I remarked that all the copartners should have been sued, as the action was quasi ex contractu. It was unnecessary in that case to say anything on that point, as no plea in abatement had been pleaded; and upon further examination, I am satisfied the remark is incorrect, for the reasons above assigned.

It is certainly now settled in England, that an action against a common carrier upon the custom, is founded on a breach of duty; that it is a tort or misfeasance; and it follows that it is joint or several.

In the case now under consideration, all the counts are substantially upon the custom and in case, though some of them contain expressions similar to those used in actions of assumpsit; but there is none of them which relies upon any undertaking of the defendants, and they all state the gravamen to be a breach of duty.

I am, therefore, of opinion, that an action on the case against a common carrier belongs to the class of actions arising upon a tort or misfeasance ex delicto; and that such actions, being as well several as joint, it is unnecessary to join all the joint tort feasors. The demurrer is well taken, and the plaintiff is entitled to judgment of respondeas ouster.

Justices SUTHERLAND and MARCY did not hear the argument of this case, and gave no opinion.[11]

[11] For the early conception of the duty attached to the exercise of a public employment, see Professor Beale, The Carrier's Liability, Its History, 11 Harvard Law Review, 158, 163. For the significance of the assumpsit in a declaration in tort, see Professor Ames, The History of Assumpsit, 2 Harvard Law Review, 1, 3–6. For an example of a declaration upon the custom of the realm against a common carrier, see Chamberlain v. Cooke, 2 Vent. 75 (1689).

## CHAPTER II

## LIABILITY FOR INJURY TO PASSENGERS

### ASTON v. HEAVEN.

**(Court of Common Pleas, 1796. 2 Esp. 533.)**

Case against the defendants as proprietors of the Salisbury stage-coach, for negligence in the driving of the said coach; in consequence of which the coach was overset, and the plaintiff much bruised and her finger broke. The plaintiff proved the oversetting of the coach, and the accident having happened from the oversetting of the coach, she being an outside passenger. * * *

EYRE, C. J.* This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that whenever a case happens, even where there has been no negligence, he would take the opinion of the court, whether defendants circumstanced as the present, that is, coach owners, should be liable in all cases, except where the injury happens from the act of God or of the king's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods intrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of persons. This action stands on the ground of negligence only. * * *

The immediate cause of the accident is agreed on all hands. The question therefore depends on the consideration of whether there was any negligence in the driver. It is said he was driving with reins so loose, that he could not readily command his horses. If that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable. It is for the jury to say whether it proceeded from that cause or not.

The jury found a verdict for the defendants.

* Parts of the statement of facts and of the opinion are omitted.

## CHRISTIE v. GRIGGS.

(Nisi Prius, 1809. 2 Campbell, 79.)

This was an action of assumpsit against the defendant as owner of the Blackwall stage, on which the plaintiff, a pilot, was traveling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axletree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed—there rested his case.

Best, Sergeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskillful, or of the coach being insufficient.

Sir JAMES MANSFIELD, C. J. I think the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident.

The defendant then called several witnesses, who swore that the axletree had been examined a few days before it broke without any flaw being discovered in it; and that when the accident happened, the coachman, a very skillful driver, was driving in the usual track and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of everything like negligence, the question for the jury would be—as to the sufficiency of the coach. If the axletree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore,

if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.[1]

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## LOUISIANA & N. W. R. CO. v. CRUMPLER.

(Circuit Court of Appeals, Eighth Circuit, 1903. 122 Fed. 425, 59 C. C. A. 51.)

THAYER, Circuit Judge.[2] This is an action which was brought by J. F. Crumpler against the Louisiana & Northwest Railroad Company to recover damages which the plaintiff below sustained in consequence of the derailment of one of the defendant company's trains on which the plaintiff was riding as a passenger. * * * The evidence in the lower court is not set out in full in the record, but it is conceded that it tended to show that the derailment of the train was caused by the bad condition of the roadbed at the place where the cars left the track; that many of the ties at that place were rotten; and that many of the spikes that fastened the rails to the ties were loose. It is likewise conceded that there was testimony to the contrary, which tended to show that the track where the derailment occurred was in a reasonably safe condition, and that the derailment might have been occasioned by reason of the fact that the trucks of one of the cars were new or stiff, being very little worn, and that this car first left the track as the train was moving around a curve and was approaching a trestle.

At the conclusion of the testimony the court charged the jury to the following effect: That while the duty rested upon the defendant company, as a carrier of passengers, to exercise the highest practical care to provide a safe roadbed, sound ties, and strong rails securely laid, and safe cars wherewith to transport the plaintiff, and that if it was guilty of negligence in any one or in all of these particulars the plaintiff might recover, provided the injury of which he complained was the direct result of one of such acts of negligence, yet that the duty resting upon the defendant as a carrier of passengers did not compel it to exercise all the care and diligence the human mind could conceive of, nor such care as would render the transportation of passengers free from any possible danger to them, nor such as would drive the carrier out of business; that the carrier, for instance, was not required to lay iron or granite cross-ties simply because such ties were less liable to decay, and hence safer than wood; that it was required to exercise the highest degree of practical care, diligence, and skill, but that there were some casualties which human sagacity could

[1] Acc. Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115 (1839); Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346 (1845); Bush v. Barnett, 96 Cal. 202, 31 Pac. 2 (1892).

[2] Parts of the opinion are omitted.

not guard against and foresee, and that every passenger must make up his mind to meet the risks incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance, and to submit to the privations and restraints and conform to the provisions which might be made and enforced for his safety and protection. It further charged the jury that when a train of cars on which a person is riding leaves the track, or is derailed, such an occurrence creates a presumption that the carrier has been in some respect negligent, and entitles the passenger to recover for such injuries as he may have sustained in consequence of the derailment, unless the presumption of negligence is overcome by proof to the contrary introduced by the carrier. After giving these general directions, the trial judge instructed the jury that the question whether the defendant company had been guilty of culpable negligence as charged by the plaintiff was a question of fact, which the jury must determine in the light of all the evidence in the case.

The defendant company took no exception to the aforesaid charge except to the paragraph which declared that the duty rested upon it to exercise the highest degree of practical care to provide a safe road-bed, sound cross-ties, and safe cars to transport the plaintiff, and that if the defendant was negligent in either of these respects, and the plaintiff was injured in consequence thereof, he might recover. This exception is not argued in this court, nor could the principle of law announced be seriously challenged, since the same doctrine was enunciated in Indianapolis, etc., Railroad Co. v. Horst, 93 U. S. 291, 296, 297; 23 L. Ed. 898, from which the charge of the trial court seems to have been compiled.

The defendant company complains principally because the trial judge declined to give two instructions that were asked in its behalf. * * * The first of these instructions stated a mere truism, namely, that if the track, at the time of the derailment, was in good condition, then there could be no finding against the defendant on account of a defective track. The other instruction, to the effect that if the derailment was occasioned by some defect in one of the trucks, which could not have been discovered by the exercise "of the utmost care, skill, and diligence," then the defendant was not liable, was a direction which was practically given by the court as heretofore shown. In other words, the jurors were instructed that the defendant company could not be held accountable for a derailment that was occasioned by a defect either in the track or car, against which the defendant could not have guarded by the exercise of the utmost care, skill, and diligence. We think that the case was submitted to the jury under instructions as to the law that were substantially correct, and that no occasion exists for granting a new trial. It is highly probable that the jury were of opinion that the defendant company had not suc-

ceeded in overcoming the presumption of negligence which was raised by the fact that while the train was moving at a usual rate of speed it left the track and rolled down an embankment.

The judgment below is accordingly affirmed.[8]

[8] In Dodge v. Boston & Bangor S. S. Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541 (1889), printed on another point, post, p. 517, Knowlton, J., said: "Because a passenger's life and safety are necessarily intrusted in a great degree to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stagecoaches, steamboats, and sailing vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger. * * * Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions 'utmost care and diligence,' 'most exact care,' and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular with a reasonable regard to the business in all other particulars."

In Steele v. Southern Ry. Co., 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756 (1899), the plaintiff, a passenger on a freight train riding in the caboose, was injured in a collision between the sections of the train which had become uncoupled while running. A judgment in his favor was reversed for the court's refusal to tell the jury that in considering whether the carrier was negligent they should take into account the difference between the operation of a freight and of a passenger train. Jones, J., for the court, said: "Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of care in all cases; but in applying this rule the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train the highest degree of care may require the use of a bell cord or a brakeman on each car, or automatic brakes; but in the management of a freight train the same degree of care may not require all these things. To require of freight trains all the safeguards against danger which is required of a passenger train might render the operation of freight trains impracticable in many localities. These views are supported by the authorities."

It has been held to be reversible error to instruct a jury as to the care owed by a common carrier to its passengers in terms properly used in stating the care owed in ordinary relations. Spellman v. Lincoln R. T. Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753 (1893); Lewis v. Houston Electric Co., 39 Tex. Civ. App. 625, 88 S. W. 489 (1905). Contra: Pomroy v. Bangor Co., 102 Me. 497, 67 Atl. 561 (1907). And see Ferguson v. Truax, 136 Wis. 637, 643, 118 N. W. 251 (1908). On the other hand, it has been held that an instruction that the carrier owes the highest care sets the standard too high. Denham v. Washington Water Power Co., 38 Wash. 354, 80 Pac. 546 (1905); Tri-City Ry. Co. v. Gould, 217 Ill. 317, 75 N. E. 493 (1905).

A passenger is not held to a peculiarly high degree of care. If he exercises the care of a prudent man, he is not guilty of contributory negligence. South-

## BOSWORTH v. UNION R. CO.

(Supreme Court of Rhode Island, 1903. 25 R. I. 202, 55 Atl. 490.)

DUBOIS, J. This is an action of trespass on the case for negligence. In the second count of his declaration the plaintiff alleges that it was the duty of the defendant to exercise the utmost vigilance and care in guarding and protecting him, as and while a passenger, against violence and risk of injury; and that the defendant was negligent in not exercising proper and adequate care and vigilance in guarding and protecting him, while he was its passenger, against mob violence, and in attempting to run its car through a mob without warning the plaintiff of the dangers to which he was being exposed thereby, in consequence of which he sustained the injury complained of. The defendant demurs to such statement of its duty.

We have heretofore, in Boss v. Prov. & Wor. R. R. Co., 15 R. I. 149, 1 Atl. 9, thus stated the law: "In regard to the degree of care which the law imposes upon common carriers of passengers, it is settled by a long and uninterrupted line of adjudication that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances; and they are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants." And later, in Elliott v. Newport St. Ry. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, as follows: "Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers."

The defendant, though not denying the foregoing to be the general rule applicable to common carriers of passengers, claims that it particularly applies to its running appliances, for the reason that defects therein are likely to occasion accidents resulting in great injury and loss of life to passengers; and also calls our attention to another rule, relating to its approaches to trains, concerning which it is bound to use only ordinary care.

We recognize the distinction in the law between the degree of care to be used in its stationary and in its locomotive appliances. The more stringent rule is established for the protection of passengers while in transit. During their passage they are to be guarded not only against accidents resulting from defects in the running appliances, but also

ern Ry. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979 (1905); Chicago, etc., R. Co. v. Troyer, 70 Neb. 293, 103 N. W. 680 (1905).

See, further, as to the standard of care, Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695 (1860); Indianapolis & St. Louis R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898 (1876); Pershing v. Chicago, etc., R. Co., 71 Iowa, 561, 32 N. W. 488 (1887); Williams v. Spokane Falls & No. Ry. Co., 39 Wash. 77, 80 Pac. 1100 (1905); Hutchels v. Cedar Rapids, etc., Ry. Co., 128 Iowa, 279, 103 N. W. 779 (1905); Kirkpatrick v. Met. St. Ry. Co., 211 Mo. 68, 109 S. W. 682 (1908); Readhead v. Railway Co., L. R. 4 Q. B. 379 (1869).

from dangers arising out of the recklessness or carelessness of the servants of the common carrier. With the best appliances it would be possible for a careless or reckless servant to propel a car into danger; as, for instance, into an open draw on a bridge, into a blazing station, or into a drove of infuriated cattle.

In approaching any place of danger it is the duty of the common carrier of passengers and its servants to exercise the utmost care, caution, vigilance, and skill which prudent men would use under like circumstances. Whether the servants and agents of the defendant did exercise that degree of care and skill at the time and place alleged by the plaintiff is a question of fact, which must be determined by a jury.

Demurrer overruled, and case remanded to the common pleas division for further proceedings.[4]

[4] REQUIREMENT OF ALL PRACTICABLE CARE—TO WHAT PARTICULARS IT APPLIES.—(a) *Acts of Others.*—Chicago & Alton R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483 (1887), accords with the principal case. Contra: Missimer v. Phil. R. Co., 17 Phila. (Pa.) 172 (1885). And see Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519 (1903).

For bodily injury to a passenger from the disorderly conduct of *another passenger*, when such injury was reasonably to have been anticipated, a common carrier is liable, if it is attributable to his failure to use the highest practicable care to protect the passenger injured. Simmons v. New Bedford Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99 (1867); Flint v. Norwich, etc., Co., 34 Conn. 554, Fed. Cas. No. 4,873 (1868); Lucy v. Chicago, etc., Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551 (1896). But see Tall v. Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120 (1899).

(b) *Management of Vehicles Other than That in Which the Passenger is Riding.*—Sherlock v. Alling, 44 Ind. 184 (1873); Atlanta, etc., Co. v. Bates, 103 Ga. 333, 30 S. E. 41 (1898). And see Hayne v. Union St. Ry. Co., 189 Mass. 551, 76 N. E. 219, 3 L. R. A. (N. S.) 605, 109 Am. St. Rep. 655 (1905), ante, p. 80, note.

(c) *Passengers Not in Course of Transportation.*—A carrier is bound to *conduct transportation* with the same care for his passenger's safety, whether the passenger is in the vehicle or out of it, provided he is at the time so under the carrier's protection that the relation of passenger and carrier exists. As to when the relation exists, see post, pp. 489–495, 517–524. Hence a railroad must use all practicable care in running a train not to run over a passenger about to board another train. Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700 (1864). Or a passenger just alighted from another train. Gaynor v. Old Col. Ry. Co., 100 Mass. 208, 97 Am. Dec. 96 (1868), semble; Denver, etc., R. Co. v. Hodgson, 18 Colo. 117, 31 Pac. 954 (1892), semble; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713 (1898), semble. In placing a stool for a passenger to step on in alighting. Southern Ry. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015 (1902). In starting its street car as a passenger is about to get on. Lewis v. Houston El. Co., 39 Tex. Civ. App. 625, 88 S. W. 489 (1905). In reversing the pole of a trolley car. Keator v. Scranton Traction Co., 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758 (1899). In taking trunks from a baggage car when a passenger is standing on the station platform. Holcombe v. So. Ry. Co., 66 S. C. 6, 44 S. E. 68 (1903). In handling a steamboat's gang plank when a passenger, leaving the boat to get breakfast ashore, has just reached the wharf. Dodge v. Boston, etc., S. S. Co., post, p. 517. In discharging cargo. Packet Co. v. True, 88 Ill. 608 (1878). Compare Central R. R. Co. v. Perry, 58 Ga. 461 (1877).

(d) *Safety of premises.*—In Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874 (1885), it was said: "While it is the duty of a railroad company to keep its platform and approaches safe and convenient for the ingress and egress

## VAN BLARCOM v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey, 1906. 73 N. J. Law, 540, 64 Atl. 111.)

MAGIE, Ch.[5] The judgment of the Supreme Court, brought into review by this writ of error, affirmed a judgment of the circuit court of the county of Essex, entered upon a verdict of a jury in an action by an administrator to obtain damages on the ground of the death of his intestate, which was claimed to have resulted from the negligence of the plaintiff in error.

Of the numerous assignments of error presented in the Supreme Court and here, only one has been deemed of sufficient importance to require discussion. The question is raised upon an assignment of error founded upon an exception to a portion of the charge of the trial judge to the jury. To make intelligible the point thus presented, it is proper to say that the evidence disclosed that the intestate was in the employ of the railroad company at the time of his death. It appeared that he, with others, was riding upon a locomotive engine, after the close of their work, and were returning to the place where the locomotive would be left for the night, and they would go to their homes. While the locomotive was proceeding in that direction, it

of passengers to and from its cars, the rigor of the rule which requires it, out of considerations of public policy, to exercise the highest possible diligence for the benefit of the passenger while in the actual progress of his journey, and holds it responsible for the slightest defect in its machinery, track and appliances, is measurably relaxed with respect to its platform and approaches. With respect to these, it is to be held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business."

This rule has been applied by many courts, even where a person is injured by an imperfection in the platform in the very act of alighting from the train and before he has ceased to be a passenger. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874 (1885); Falk v. N. Y., etc., R. Co., 56 N. J. Law, 380, 29 Atl. 157 (1894); Finseth v. Suburban Ry. Co., 32 Or. 1, 51 Pac. 84, 39 L. R. A. 517 (1897); St. Louis, etc., Ry. Co. v. Barnett, 65 Ark. 255, 45 S. W. 550 (1898), semble; Crowe v. Michigan Central R. Co., 142 Mich. 693, 106 N. W. 395 (1906), semble.

Contra, and holding that the carrier is bound to the same high care in providing a safe place to alight as in conducting transportation. Mo. Pac. Ry. Co. v. Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 769 (1889); Topp v. United Rys., etc., Co., 99 Md. 52, 59 Atl. 52 (1904), semble.

On the other hand, it is held in some states that the care which a common carrier owes its passengers to keep in safe condition its platforms, stations, and other premises where they have a right as passengers to be, is the same in degree as that which it owes in running its trains; that it owes this care, not only when the passenger is in the act of getting into or out of its cars, but at all times when the relation of passenger and carrier exists; and that it is an obligation distinct from the duty of using the care of a prudent man not to expose to hidden dangers which measures the carrier's duty towards those who come to its stations upon other business or who come

[5] Part of the opinion is omitted.

left the rails, was overturned, and the intestate received injuries from which he died.

It is obvious, from these facts, that the question was whether the railroad company, the employer of the intestate, had failed in the performance of any duty which it owed to its employé. The evidence was directed to the negligence of the company in keeping its roadbed safe for the travel of the locomotive thereon. This court has recently had before it, for consideration, the question of what duty a railroad company owes to its employés, when they are required, in the performance of their duties, to travel on its trains. It was settled that a railroad company which, like other employers of labor, is required to take reasonable care to provide safe places for its employés to perform their work in, is, upon the same principle, bound to exercise reasonable care to so construct and maintain the tracks and roadbed as to make them reasonably safe for such travel. It was declared that, so far as the trainmen are concerned, the tracks and roadbed come within the rule which imposes on the employer the duty to take care that the places in which, and the appliances with which, his employé is to work, shall be reasonably safe for the purpose. Smith v. Erie R. Co., 67 N. J. Law, 636, 52 Atl. 634, 59 L. R. A. 302.

The exception on which the assignment of error now in question was based was directed to a passage from the charge of the trial judge, which reads thus: "In the first place, it was the obligation of this railroad company to use a high degree of care to keep its roadbed in a

intending to be passengers, but who have not yet so put themselves into the carrier's charge as to become such. Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700 (1864); Jordan v. N. Y., etc., R. Co., 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522 (1896), semble; but see Moreland v. Boston, etc., R. Co., 141 Mass. 31, 6 N. E. 225 (1886); Gulf, etc., Ry. Co. v. Butcher, 83 Tex. 309, 18 S. W. 583 (1892); Johns v. Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709 (1893); Illinois Central R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290 (1899), semble. Contra, holding that only ordinary care is required. Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433 (1887); Falls v. San Francisco R. R. Co., 97 Cal. 114, 31 Pac. 901 (1893), semble; McNaughton v. Ill. Cent. R. Co., 136 Iowa, 177, 113 N. W. 844 (1907); Bacon v. Casco Bay Steamboat Co., 90 Me. 46, 37 Atl. 328 (1897); Maxfield v. Me. Cent. R. Co., 100 Me. 79, 60 Atl. 710 (1905).

Towards persons at stations who have not yet become or who have ceased to be passengers only ordinary care is due, either as to condition of premises, Glenn v. Lake Erie & W. R. Co. (Ind. App.) 73 N. E. 861 (1905), and cases there cited (but see Johns v. Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709 [1893]); or as to running of trains, Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827 (1901); Chicago & Gd. Trunk Ry. v. Stewart, 77 Ill. App. 66 (1898).

It has been held that the carrier need exercise only ordinary care to prevent a passenger falling over an obvious fixture in a steamer's deck. Bruswitz v. Netherlands, etc., Co., 64 Hun, 262, 19 N. Y. Supp. 75 (1892). Being hurt by the fall of an article put by another passenger in the rack over his seat in a car. Morris v. N. Y. Cent. R. Co., 106 N. Y. 678, 13 N. E. 455 (1887). Slipping on ice which had formed on car steps in a storm. Palmer v. Pa. Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252 (1888). Contra, as to ice on the deck of a ferry boat. Rosen v. Boston, 187 Mass. 245, 72 N. E. 992, 68 L. R. A. 153 (1905).

safe condition for the uses for which it was designed." The instruction was deemed to be erroneous by the Supreme Court, and we entirely concur in the view expressed in that court on that subject. The duty which devolved on the railroad company was limited to the exercise of reasonable care for the safety of its tracks and roadbed. That duty should have been placed before the jury, and they should have been directed to find whether the roadbed was in the condition which reasonable care would have produced. To direct them that the company owed a duty expressed by the words "a high degree of care" tended to mislead, and must have been injurious in its result. * * *

As we find the rule of duty laid down was erroneously stated, the judgment must be reversed for a venire de novo.[6]

[6] Acc. Mo. Pac. R. Co. v. Lyde, 57 Tex. 505 (1882); Sappenfield v. Main St. R. Co., 91 Cal. 48, 27 Pac. 590 (1891); Wabash R. Co. v. Farrell, 79 Ill. App. 508, 516 (1898).

As regards persons who contract with a common carrier for permission to occupy its vehicles, not primarily for the purpose of being transported to a particular destination, but in order to transact business there in their own and not in the carrier's behalf, although their legal relation to the carrier is in some respects like that of employés, and not like that of passengers, yet in respect to the right of safe carriage they have often been held to be like ordinary passengers. That is to say, although the carrier has acted with ordinary prudence, he is liable for bodily injury attributable to a failure to use all practicable care.

POSTAL CLERKS.—Seybolt v. N. Y., L. E. & W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (1884); Mellor v. Mo. Pac. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36 (1891); So. Pac. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350 (1906).

EXPRESS MESSENGERS.—See Blair v. Erie Ry. Co., 66 N. Y. 313, 23 Am. Rep. 55 (1876); Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528 (1892); Jennings v. Railroad, 15 Ont. App. 477 (1887); Union Pacific Ry. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475 (1871); San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839 (1894); Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345 (1891); Voight v. B. & O. S. W. Ry. Co. (C. C.) 79 Fed. 561 (1897); Savannah, F. & W. Ry. Co. v. Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104 (1902); Davis v. C. & O. Ry. Co., 122 Ky. 528, 92 S. W. 339, 5 L. R. A. (N. S.) 458, 121 Am. St. Rep. 481 (1906); Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208 (1880). Contra: Chicago & N. W. Ry. Co. v. O'Brien, 132 Fed. 593, 67 C. C. A. 421 (1904), semble. And compare Blank v. Ill. C. R. R. Co., 182 Ill. 332, 339, 55 N. E. 332 (1899).

PULLMAN PORTERS.—Jones v. St. Louis Southwestern Ry. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514 (1894), semble. Contra: Hughson v. Richmond, etc., R. Co., 2 App. D. C. 98 (1894).

VENDERS OF GOODS.—One who pays for the privilege of traveling upon passenger trains for the purpose of selling popcorn is a passenger, within the meaning of a statute imposing a penalty for negligently killing a passenger. Com. v. Vermont & Mass. R. R., 108 Mass. 7, 11 Am. Rep. 301 (1871). One who has bought the privilege of running a bar upon a steamboat is a passenger, within the rule that an injury to a passenger from an accident to the machinery of transportation is presumably due to the carrier's negligence. Yeomans v. Contra Costa S. N. Co., 44 Cal. 71 (1872). Compare Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121, 52 L. R. A. 854, 81 Am. St. Rep. 347 (1900); Indianapolis St. Ry. Co. v. Hockett, 161 Ind. 196, 67 N. E. 106 (1903), newsboys entering street car by permission of company to sell to passengers.

PERSONS ENTERING VEHICLES TO ASSIST PASSENGERS TO A SEAT.—A person who, with the carrier's knowledge, is permitted to enter a car to give necessary assistance to a passenger, is entitled to care from the carrier, and, if injured by the negligent starting of the train before he has had an opportunity

## WILLIAMS v. SPOKANE FALLS & N. RY. CO.

(Supreme Court of Washington, 1905. 39 Wash. 77, 80 Pac. 1100.)

DUNBAR, J.[1] Respondent was a railway postal clerk in the service of the United States. On August 15, 1903, he was one of the clerks in charge of a postal car attached to a train of the appellant running between Spokane and Northport. The car on which he was occupied was, pursuant to the usual custom, detached from the train at the latter point, and set in on a side track, to be returned to Spokane on the day following. Northport is a terminal point, and trains are made up at that point for other destinations. The siding upon which this postal car was placed was 300 feet in length, and an even grade. A switch engine engaged in making up a passenger train entered upon this track with a baggage car and two coaches. For some cause, unknown and unexplained by the testimony, the coupler which connected the baggage car with the tender of the locomotive parted, and the three cars ran along the siding and collided with the postal car which contained the respondent, injuring him most seriously. This action was brought to recover damages for the injuries so sustained, and resulted in a verdict in respondent's favor. Motion for new trial was duly entered and overruled, and judgment rendered upon the verdict, from which judgment this appeal is taken.

It is conceded that the respondent was performing his duty on the car, and it is also conceded that the rules of law applying to passengers on a railroad car apply to him. At the conclusion of the testimony for both respondent and appellant, the appellant requested the court to charge the jury to find for the defendant. This request was overruled, and upon the action of the court in this respect is based the first assignment of error, the contention being that there was no proof that there was any negligence on the part of the appellant; that there is no allegation that there was any defect in the construction of the cars or in their equipment, or that they were in a defective or unsafe condition, in any respect, at the time of the happening of the

to get out safely, may maintain an action. It has been held that the carrier owes such a person the same high degree of care which is owed to a passenger. Louisville & Nashville R. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889). And see note in 14 Harv. L. R. 69. But the weight of authority requires only the ordinary degree of care. Lucas v. N. B. & T. R. R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406 (1856). And see Flaherty v. B. & M. R. R., 186 Mass. 567, 72 N. E. 66 (1904); Railway Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905 (1894); Doss v. M., K. & T. R. R. Co., 59 Mo. 27, 21 Am. Rep. 371 (1875); Coleman v. Ga. R. & Banking Co., 84 Ga. 1, 10 S. E. 498 (1889); Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48 (1892); International & G. N. R. Co. v. Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401 (1896); Dunne v. N. Y., N. H. & H. R. Co., 99 App. Div. 571, 91 N. Y. Supp. 145 (1904); 15 L. R. A. 434, note.

As to a carrier's duty toward persons who enter its cars or station merely to accompany a passenger, see Carriers, Dec. Dig. § 304.

[1] Part of the opinion is omitted.

accident; and that no legal presumption of negligence arose, casting upon appellant the burden of disproving it. The particular negligence alleged is that, while respondent was in the discharge of his duties in a postal car on a siding at Northport, the appellant's servants and employés negligently ran and propelled against said mail car other cars, by means of a locomotive operated by it, and said mail car was struck by said cars, propelled with great force and violence, pushing it along for a distance and derailing it, thereby throwing respondent down. The answer denied any negligence, and it is contended that there was no negligence shown.

Hawkins v. Front Street Cable Ry. Co., 3 Wash. St. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, and Allen v. N. P. Ry. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, are relied upon to sustain the appellant's contention. In Hawkins v. Cable Ry. Co., supra, this court held that the following instruction, "It is the law that, where a passenger being carried on a train is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it," constituted reversible error, as being too broad a statement of the responsibility of the carrier. There, it will be observed, the instruction overruled had no limitations whatever; and, under that instruction, if the passenger had been injured by some unavoidable accident, disconnected entirely from the railroad company, such as an injury resulting from the discharge of a firearm by some one in the car, or through the window by some one outside of the car, the company would have been held responsible. So that it is not enough that the passenger is injured without fault of his own, but the injury must be connected in some way with the operation of the road; and, when the injury is so connected, we think, under the overwhelming weight of authority, that a prima facie case of negligence is made out by the plaintiff, and that the duty devolves upon the company to establish a want of negligence on its part. And the cases cited by this court in that case show that such was the view that the court took of the law.

There is nothing in the case of Allen v. N. P. Ry. Co., supra, to sustain appellant's contention. Mr. Thompson, in his Commentaries on the Law of Negligence, vol. 3, § 2754, very happily expresses the distinction which we have sought to make. The section is as follows: "In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof in the first instance is, of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim res ipsa loquitur, a presumption arises of negligence

on the part of the carrier or his servants, which, unless rebutted by him to the satisfaction of the jury, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a prima facie case for damages against the carrier by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage."

And in section 2756, showing that the presumption arises not from the happening of the accident, but from a consideration of the cause of the accident, it is further said: "It has been pointed out by an able judge that the presumption which arises in these cases does not arise from the mere fact of the injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.'" And a wilderness of cases is cited to sustain the announcement of the text.

The cases on this subject are collated in the Century Digest, vol. 9, commencing on page 1235, and the doctrine is almost universally announced that the fact that an injury results from a railroad collision without any fault of the passenger is prima facie evidence of carelessness, negligence, or want of skill on the part of the company,[8] and the burden is upon it to prove that the accident was not occasioned by the fault of its agents. Goble v. Delaware, L. & W. R. Co., Fed. Cas. No. 5,488a; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Chicago City Ry. Co. v. Engel, 35 Ill. App. 490; Central Pass. Ry. Co. v. Bishop, 9 Ky. Law Rep. 348; N. C. St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899—and many other cases too numerous to cite, the circumstances of which are parallel in principle with the circumstances in this case, support the

[8] But see Mitchell v. Chicago, etc., Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566 (1883); Thurston v. Detroit, etc., Co., 137 Mich. 231, 100 N. W. 395 (1904); Stoody v. Railway Co., 124 Mich. 420, 83 N. W. 26 (1900); Ayles v. So. Eastern Ry. Co., L. R. 3 Ex. 146 (1868); Hammack v. White, 11 C. B. (N. S.) 588, 593, 594 (1862); East Indian Ry. Co. v. Kalidas Mukerjee, [1901] A. C. 396.

law announced. This is also in accordance with a decision made by this court in Walker v. McNeill, 17 Wash. 582, 50 Pac. 518, where it was said: "Whenever a car or train leaves the track, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated." And this is the just and equitable rule, for the cause of the accident is within the knowledge of the railroad company, while it might be a difficult matter for the plaintiff to prove what the cause of the accident was.

So far as the proof was concerned, we think, also, that there was ample proof to show negligence on the part of the appellant. There was testimony to the effect that this coupling had come apart several times before, and that it was within the knowledge of the appellant's servants that it was liable to come apart; and, having that knowledge, it had no right to throw off the safety chains simply for the purpose of expediting its business, to the extent of imperiling the life of the respondent. This manner of switching could only be safely done and relied upon on the supposition that the coupling could be absolutely depended upon, and the removal of the safety appliance under such circumstances constituted negligence on the part of the company towards its passengers.

We think the court committed no error in overruling the appellant's motion for an instruction to find a verdict for the defendant.[9] * * *

[9] PERSONS WHO ARE ENTITLED TO THE BENEFIT OF THE PRESUMPTION OF NEGLIGENCE.—In Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 662, 21 Sup. Ct. 275, 45 L. Ed. 361 (1901), an action by a fireman injured through a defect in his locomotive, the trial court directed a verdict for the defendant and the U. S. Supreme Court affirmed the judgment. Brewer, J., speaking for the court said, after a review of the evidence: "Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (Stokes v. Saltonstall, 13 Pet. 181 [10 L. Ed. 115]; Railroad Company v. Pollard, 22 Wall. 341 [22 L. Ed. 877]; Gleeson v. Virginia Midland Railroad, 140 U. S. 435, 443 [11 Sup. Ct. 859, 35 L. Ed. 458]), a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617 [17 Sup. Ct. 707, 41 L. Ed. 1136]. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. * * * If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It has been held that a postal clerk, like an ordinary passenger, has the benefit of the presumption of negligence. Magoffin v. Mo. Pac. Ry. Co., 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798 (1890); Gleeson v. Va. Midland R. R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458 (1891).

It has been held otherwise as to an express messenger. Chicago, etc., Ry. Co. v. O'Brien, 132 Fed. 593, 67 C. C. A. 421 (1904). And as to a Pullman por-

## LOUDOUN v. EIGHTH AVE. R. CO.

(Court of Appeals of New York, 1900. 162 N. Y. 380, 56 N. E. 988.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First judicial department, entered April 23, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

ter. Hughson v. Richmond, etc., R. Co., 2 App. D. C. 98 (1894). But see ante, p. 335, note.

FACTS UPON WHICH THE PRESUMPTION OF NEGLIGENCE IS FOUNDED.—The presumption of negligence arises where injury to a passenger is due to a landslide from the side of a railroad cutting. Gleeson v. Va. Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458 (1891). But not where it is due to the falling of a stone from a hillside above the cutting. Fleming v. Pittsburg, etc., Ry., 158 Pa. 130, 27 Atl. 858, 22 L. R. A. 351, 38 Am. St. Rep. 835 (1893). It arises where a passenger is struck by a piece of coal thrown or falling from a passing train. Louisville & Nashville Ry. Co. v. Reynolds, 71 S. W. 516, 24 Ky. Law Rep. 1402 (1903). But it does not arise from the mere fact that there is some evidence that the object which struck the passenger was a piece of coal so thrown. Pennsylvania R. Co. v. MacKinney, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601 (1889). Or that it was an iron bolt like that used on freight cars. Pa. R. Co. v. McCaffrey, 149 Fed. 404, 79 C. C. A. 224 (1907). It arises where a passenger is hit by a hot cinder from the locomotive. Texas Midland Ry. Co. v. Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797 (1901). But not where he is hit by a stream of water entering the car, but not shown to have proceeded from an appliance belonging to the carrier. Spencer v. Chicago, M. & St. P. Ry. Co., 105 Wis. 311, 81 N. W. 407 (1900). No presumption of the carrier's negligence arises from the fact that a passenger falls when getting out of the car. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874 (1885); Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N. W. 258, 119 Am. St. Rep. 879 (1905). Even though the passenger acts with due care. Chicago City Ry. Co. v. Catlin, 70 Ill. App. 97 (1897). And there is evidence of the carrier's negligence. Delaware, L. & W. R. Co. v. Napheys, 90 Pa. 135 (1879). Contra: Doolittle v. Southern Ry. Co., 62 S. C. 130, 40 S. E. 133 (1901); Texas & P. Ry. Co. v. Gardner, 114 Fed. 186, 52 C. C. A. 142 (1902), semble; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2 (1892), semble.

Nor does a presumption of negligence arise, though an act or appliance of the carrier contributed to the injury, if the thing done was usual in the ordinary and proper conduct of his business.

So the mere facts that in the coupling of cars a train receives a jar, and that the jar causes a passenger to fall against a car seat and suffer serious injury, do not raise a presumption that the coupling was negligently performed. Herstine v. Lehigh V. R. R. Co., 151 Pa. 244, 25 Atl. 104 (1892). Contra: Railroad Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877 (1874), where train stopped abruptly at a station. Nor does the presumption arise where the jolting of the train in coming to a stop causes the car door to shut upon the hand of an alighting passenger. Denver & R. G. R. Co. v. Frothingham, 17 Colo. 410, 68 Pac. 978 (1902); Weinschenck v. New York, N. H. & H. R. R., 190 Mass. 250, 76 N. E. 662 (1906). Nor where a brakeman shuts the door upon a passenger's hand. Texas & Pac. Ry. Co. v. Overall, 81 Tex. 247, 18 S. W. 142 (1891). Nor where a passenger is hit by a swinging door in a ferryboat. Hayman v. Pa. R. Co., 118 Pa. 508, 11 Atl. 815 (1888). Nor where, because a car door is open against the rules of the company, a cinder, which without the carrier's negligence escapes from the locomotive, enters the car and gets into a passenger's eye. Missouri, K. & T. Ry. Co. v. Orton, 67 Kan. 848, 73 Pac. 63 (1903). But see Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666 (1905).

CULLEN, J.[10] This action was brought to recover damages for personal injuries alleged to have been received in a collision between the cars of the two defendants. The plaintiff and her husband were passengers in an open horse car on the Eighth Avenue Railroad. The Third Avenue Railroad Company operated a cable road on One Hundred and Twenty-Fifth street, which crosses Eighth avenue at right angles. At the time of the collision the plaintiff was sitting in the rear seat of the Eighth Avenue car. That car, while passing over the intersection of the two roads, was struck by the cable car at the point where the plaintiff was sitting, with such force as to throw the horse car from the track. The plaintiff was thrown down from her seat, and undoubtedly was bruised, but whether she received the serious injuries to her nerves and health for which she was allowed compensation was a matter of controversy. The evidence as to the manner in which the collision occurred is extremely meager, consisting only of the testimony of the plaintiff and her husband. Neither defendant produced as witnesses the employés in charge of its car. Neither the plaintiff nor her husband noticed the approach of the cable car, and they were able to state only that, while the car in which they were riding was passing over the crossing, it was struck by the other car.

We agree with the learned court below that the details of the collision, meager as they were, required submission to the jury of the issue of negligence as to each defendant, and that a nonsuit as to either would have been improper. * * * We are of opinion, however, that the learned trial judge erred in his instructions to the jury, and that for such errors this judgment must be reversed.

The court charged: "It is therefore a reasonable presumption, in the absence of any explanation, that the accident resulted from the want of ordinary care on the part of the defendants. When the plaintiff rested her case, therefore, the burden was upon the defendants of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. Now, no testimony is offered by the defendants to overcome this presumption. The driver of the Eighth Avenue car was not called. It does not appear that he was where he could be called. There is no explanation given, and therefore I am bound to say to you that there is no testimony to overcome the presumption of negligence which the circumstances have disclosed. There is no testimony on the part of the defendants to overcome the presumption created by the circumstances under which the collision took place."

As we read this part of the charge, the issue of the defendants' negligence was substantially taken away from the jury. It is true that the court repeatedly charged that the burden of proof rested on

[10] Parts of the opinion are omitted.

the plaintiff to establish each element of her case, including that of the negligence of the defendants. But, taken in connection with the portion of the charge quoted, that the accident raised a presumption of negligence, and that there was no testimony to overcome the presumption, the jury was substantially told the plaintiff had successfully borne that burden. Each defendant took an exception to that part of the charge which instructed the jury that the accident raised a presumption of negligence against it, calling for an explanation, though neither seems to have excepted to the charge that no explanation had been given.

The appellant the Third Avenue Railroad Company insists that the doctrine, "Res ipsa loquitur," does not apply to it, and that the instruction that the occurrence of the collision raised a presumption of negligence upon its part calling for an explanation was erroneous. With this claim we agree. Falke v. Railroad Co., 38 App. Div. 49, 55 N. Y. Supp. 984. That defendant, not being the carrier, was bound only to the exercise of ordinary care in the management of its cars. If one company had been in the control and management of both the cars, a presumption of negligence on its part would properly arise. But here there were two actors, and the collision might have been due entirely to the fault of one party, and not at all to the fault of the other.

The decisions in Volkmar v. Railway Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 630, and Hogan v. Same, 149 N. Y. 23, 43 N. E. 403, do not apply to a case like this. In those cases pieces of iron fell from the elevated railway structure and injured the plaintiffs, traveling on the highway beneath. It was held that the occurrence of the accident raised a presumption of negligence.[11] But articles should not be suffered to fall on the highway, and ordinarily do not fall without carelessness on the part of the persons letting them fall. In those cases the parties injured in no way contributed to the accident, except by their presence. Here the railroad company had the right to operate its cars along the street, and it cannot be said that in the ordinary course of things a car does not collide with vehicles or persons except when there has been carelessness in the management of the car. Unfortunately, the reports are full of cases of such collisions, and of serious injuries resulting therefrom, where it has been found, either as matter of fact by juries, or as matter of law by the courts,

[11] In Scott v. London Dock Co., 3 Hurl. & C. 596 (1865), an action for negligently dropping upon the plaintiff, a customs officer, bags of sugar which were being lowered from a warehouse by a crane, Earle, C. J., said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

that the railroad company was not at fault. The exception of this appellant to the court's charge is well taken.

As to the appellant the Eighth Avenue Railroad Company a different rule obtains. While it was not a guarantor of the safety or security of its passengers, it was bound to exercise a very high degree of care to accomplish that result. It is easy to imagine many injuries that might occur to passengers, from which no presumption of negligence would arise. But the danger of collision with other vehicles moving on the street is always present, and the employé managing and controlling the car must be on the alert to avoid that danger. The danger is greater at the intersection of other railroads, and care must there be used proportionate to the danger.

As was said by the court below, the Eighth Avenue Railroad Company could not insist upon or assert its right of way at the crossing as against the car of the other company, if there were reasonable grounds to apprehend that thereby it would endanger the safety of its passengers. The management and control of the transportation of the passenger is wholly confided to the employés operating the car; and the former cannot be expected to be on the watch either as to its management or that of other vehicles, or, if a collision takes place, be able to account for its occurrence. Therefore, when such a collision occurs, there arises a presumption of negligence on the part of the carrier, which calls upon it for explanation. The exception of the Eighth Avenue Railroad Company to the instruction of the court on this subject is not well taken.

But, though the occurrence of the accident called for an explanation by this defendant, we think the trial court erred in charging, as a matter of law, that no explanation had been furnished. We have already referred to the fact that the cable car struck the rear end of the horse car. How far this circumstance tended to show that the horse car had properly and carefully proceeded over the crossing and that the collision was due, not to its fault, but to that of the other defendant, was a question of fact for the jury, not of law for the court. * * *

While an exception was not taken to the charge of the court, the question was raised when the court refused to charge the request, "If either the conclusion of the negligence of the Eighth Avenue Railroad Company, or the absence of negligence on its part, may, with equal fairness, be drawn, then the Eighth Avenue Railroad Company cannot be recovered against," to which the defendant excepted. This refusal was consistent with the court's previous ruling that, as matter of law, the presumption of negligence had not been overcome. In our view, however, it was erroneous; for, even though the accident created a presumption of negligence on the part of the defendant the Eighth Avenue Railroad Company, still, if there was any evidence to rebut the presumption, the burden of proof rested on the plaintiff (Whitlatch v. Casualty Co., 149 N. Y. 45, 43 N. E. 405); and if, on

the whole case, the conclusion of negligence or absence of negligence could be drawn with equal fairness, that burden was not discharged. Cordell v. Railroad Co., 75 N. Y. 330. * * *

The judgment should be reversed, and a new trial granted; costs to abide the event.[12]

[12] See cases on this subject collected and commented upon in 68 L. R. A. 799, 809, note.

# CHAPTER III

# CASES NOT WITHIN THE RULE OF EXCEPTIONAL LIABILITY IN THE CARRIAGE OF GOODS

## SECTION 1.—ACT OF GOD

### AMIES v. STEVENS.

(Court of King's Bench, 1718. 1 Str. 127.)

The plaintiff puts goods on board the defendant's hoy, who was a common carrier. Coming through bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time, and offered some evidence that, if the hoy had been in good order, it would not have sunk with the stroke it received, and from thence inferred the defendant answerable for all accidents, which would not have happened to the goods in case they had been put into a better hoy. But the Chief Justice held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case: and no carrier is obliged to have a new carriage for every journey: It is sufficient if he provides one which without any extraordinary accident (such as this was) will probably perform the journey.[1]

[1] The following cases illustrate causes of loss which may fall within the class called acts of God:

EARTHQUAKE.—Slater v. So. Car. R. R. Co., 29 S. C. 96, 6 S. E. 936 (1888), washout caused by giving way of dam in Charleston earthquake of 1886.

FLOOD.—Railroad Company v. Reeves, 10 Wall. 176, 19 L. Ed. 909 (1869), unprecedented freshet; Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 554 (1879), washout caused by heavy rain; Pearce v. The Thomas Newton (D. C.) 41 Fed. 106 (1889), high tide, though exceeded twice in previous 40 years, caused by storm; Long v. Pa. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732 (1892), Johnstown flood, caused by heavy rain bursting dam; International, etc., R. Co. v. Bergman (Tex. Civ. App.) 64 S. W. 999 (1901), Galveston flood.

VIOLENCE OF WIND OR WAVES.—Blythe v. Denver & R. G. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403 (1890), railroad car overturned by wind; Hart v. Allen, 2 Watts (Pa.) 114 (1833), boat upset by squall; The Calvin S. Edwards, 50 Fed. 477, 1 C. C. A. 533 (1892), severe gale at sea, starting leaks in an old schooner such as to justify her crew in abandoning her.

But damage caused to cargo by the rolling of the vessel in a storm not of exceptional severity is not due to act of God, though inevitable. The Reeside,

## FRIEND v. WOODS.

(Supreme Court of Appeals of Virginia, 1849. 6 Grat. 189, 52 Am. Dec. 119.)

DANIEL, J.[2] * * * It is contended by the plaintiffs in error that the evidence offered by them in the court below tended to show that the loss sustained by the plaintiff was occasioned by such an extraordinary peril as negatived all legal inference of negligence on the part of the carrier, and made the loss referable to the act of God, and that the instruction given by the court at the instance of the plaintiff was erroneous and prejudicial to them.

It appears from the bill of exceptions that the plaintiff, having proved that he delivered at the Kanawha Salines, in the county of Kanawha, on board of a steamboat in the charge of the defendants, who were the owners thereof, and common carriers, a quantity of salt, to be carried on the said boat to Nashville, in the state of Tennessee, for the transportation of which the defendants were to receive a stipulated freight per barrel, and that the said boat freighted with said salt proceeded on her voyage as far as to the confluence of the Elk river with the Kanawha, when she stranded, sprung a leak, and filled with water, whereby a portion of the salt was wholly lost, and the balance much damaged and impaired in value; and the defendants having then introduced evidence tending to prove that the water in the river was in good navigable condition, that the boat was conducted through the ordinary channel for steamboat navigation, that some eight or ten days before the boat proceeded on her voyage there was a rise of Elk river, a tributary of the Kanawha, and the ice gorged at its mouth, and a bar of sand and gravel formed in the channel along which the boat had to pass, and that the officers and crew of the boat were ignorant of the formation of the bar when the boat stranded upon it, and that the officers and crew used their efforts to save the salt after the boat had so stranded, the plaintiff moved the

2 Sumn. 567, Fed. Cas. No. 11,675 (1837). Here Story, J., said: "It seems to me that the weather was not worse than what must ordinarily be expected to be encountered in such a voyage, and the rolling of the vessel in a cross sea is an ordinary incident to every voyage upon the sea." See, also, The Dutchess of Ulster, Fed. Cas. No. 14,087a (1851). And where a tug came to a stop because her intended pier was temporarily occupied, and her tow was carried against her by waves and tide not extraordinary in character, it was held that the accident, though without negligence, was not to be attributed to the act of God. Oakley v. Portsmouth, etc., Co., 11 Ex. 618 (1856). So, also, where the current of a river carries a boat ashore. Craig v. Childress, Peck (Tenn.) 270, 19 Am. Dec. 751 (1823). But cf. Nugent v. Smith, L. R. 1 C. P. D. 423, 435–438 (1876). And when a vessel was tacking near rocks a sudden failure of wind which prevented her coming about, so that she went on the rocks, was held to excuse the carrier. Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200 (1810).

BLOCKADE BY SNOW of cattle train causing cattle to freeze: Black v. C., B. & Q. R. Co., 30 Neb. 197, 46 N. W. 428 (1890); Jones v. Minneapolis, etc., R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507 (1904).

[2] The statement of facts and parts of the opinion are omitted.

court to instruct the jury upon the law governing the case. Whereupon the court instructed the jury that if they believed from the evidence that the boat was stranded by running upon a bar *previously* formed in the ordinary channel of the river, *but that the existence of the bar might by human foresight and diligence have been ascertained and avoided*, although the navigators or those in charge of the boat were ignorant of its existence at the time the boat ran upon it, the defendants were liable for the loss (if any) of the salt freighted by them on the boat occasioned by its stranding; although the jury might be satisfied that the defendants, after the boat stranded, used all the means within their power and control to preserve the freight on board the boat from being lost or injured.

Among the strongest authorities cited in behalf of the plaintiffs in error are the cases of Smyrl v. Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146, and Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235. In the former it was held that a loss occasioned by a boat's running on an unknown "snag" in the usual channel of the river is referable to the act of God, and that the carrier will be excused; and in the latter it was said that striking upon a rock in the sea not generally known to navigators, and actually not known to the master of the ship, is the act of God. * * *

The cases in which the carriers have been exonerated from losses occasioned by such obstructions as Smyrl v. Niolon, and Williams v. Grant, before mentioned, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception "of the perils of the river," or in which that exception has been confounded with the exception of the "act of God." In the case of McArthur v. Sears [21 Wend. (N. Y.) 196] a distinction between the two phrases is pointed out. It is shown that the exception "of dangers or perils of the sea or river," often contained in bills of lading, are of much broader compass than the words "act of God"; and the case of Gordon v. Buchanan, 5 Yerg. (Tenn.) 71, is cited with approbation, in which it is said that "many of the disasters which would not come within the definition of the act of God would fall within the former exception; such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided."

In a note to the case of Coggs v. Bernard, in the American edition of Smith's Leading Cases, 43 Law Lib. 180, the American decisions are collated and reviewed, and a definition is given to the expression "act of God," which expresses, I think, with precision, its true meaning. The true notion of the exception is there held to be "those losses that are occasioned exclusively by the violence of nature, by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind." "The principle that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it

may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief, solely by the act of the captain in bringing his vessel into that particular position where alone that natural object could cause mischief: rocks, shoals, currents, etc., are not, by their own nature and inherently, agents of mischief and causes of danger, as tempests, lightning, etc., are."

The act of God which excuses the carrier must therefore, I think, be a direct and violent act of nature.

The rule, it is insisted, is a harsh one upon the carrier, and it is argued that the court should be slow to extend it further than it is fully sustained by the cases. However harsh the rule may at first appear to be, it has been long established, and is well founded on maxims of public policy and convenience; and, viewing the carrier in the light of an insurer, it is of the utmost importance to him, as well as to the public who deal with him, that the acts for which he is to be excused should have a plain and well-defined meaning. When it is understood that no act is within the exception, except such a violent act of nature as implies the entire exclusion of all human agency, the liabilities of the carrier are plainly marked out, and a standard is fixed by which the extent of the compensation to indemnify him for his risks can be readily measured and ascertained. The rule, too, when so understood, puts to rest many perplexing questions of fact, in the litigation of which the advantage is always on the side of the carrier. Under this rule the carrier is not permitted to go into proofs of care or diligence, and the owner of the goods is not required to adduce evidence of negligence till the loss in question is shown to be the immediate result of an extraordinary convulsion of nature, or of a direct visitation of the elements, against which the aids of science and skill are of no avail.

So understanding the law, I do not perceive how the defendants in error could have been prejudiced by the instruction complained of, and am of opinion to affirm the judgment.

Judgment affirmed.[8]

[8] It does not suffice to relieve a carrier that the loss occurred without his fault, and from one of the following causes:

FIRE, which originates in a cause not beyond human control, though it has developed into a conflagration beyond human power to extinguish. Miller v. Steam Navigation Company, 10 N. Y. 431 (1853); Merchants' Dispatch Co. v. Smith, 76 Ill. 542 (1875), Chicago fire.

EXPLOSION of a box of detonators, part of vessel's cargo, tearing a hole in the ship's side and letting in water. The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234 (1898).

COLLISION between ships at sea, at night. Plaisted v. Boston & Kennebec St. Nav. Co. 27 Me. 132, 46 Am. Dec. 587 (1847). Running into floating wreckage at sea. The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746 (1894), semble.

STRANDING.—Running on a shoal in fog. Liver Alkali Co. v. Johnson, L. R. 9 Ex. 338 (1874). Running on a hidden rock whose existence is generally known. Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582 (1858). Running on a snag in a river, where there is room to pass safely, at least if its presence is

## NEW BRUNSWICK STEAMBOAT CO. v. TIERS.

(Court of Errors and Appeals of New Jersey, 1853. 24 N. J. Law, 697, 64 Am. Dec. 394.)

ELMER, J.[4] * * * The action was against common carriers, as such, and it is admitted that the plaintiffs made out a prima facie case, entitling them to recover, unless the defendants succeeded in excusing themselves, by evidence offered on their part. The goods were on board the defendants' barge, called the Albany, which may be assumed to have been in all respects a good and sufficient vessel, suitable for the business in which she was employed. They were received by the defendants' agents, without objection, and put on board some time during the 16th day of November, 1841, while she lay at the bulkhead of their dock in the North River, at New York. On the previous day, a severe gale commenced from the northwest, which increased during the 16th to a violent storm, and produced an unusual low tide, so that in the evening of that day the barge was driven by the wind against a piece of timber which projected from the bulkhead, 13 feet below the top of the dock, and much below the ordinary low water, the existence of which was unknown to the defendants' agents and servants. A hole was by this timber knocked through her side, so that in a short time the barge filled with water and sunk, and the goods were spoiled. * * *

The argument for the defendants in this case is that inasmuch as if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber, therefore the loss must be attributed to the storm. But if that argument was sound, it would follow that, if an unseaworthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If the vessel be in fact unfit for her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contrib-

known to others. Steele v. McTyer's Adm., 31 Ala. 667, 70 Am. Dec. 516 (1858). Contra: Smyrl v. Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146 (1831); Faulkner v. Wright, Rice (S. C.) 107 (1838). Cf. Pennewill v. Cullen, 5 Har. (Del.) 238 (1849); Bohannan v. Hammond, 42 Cal. 227 (1871).

SWEATING, or the collection of moisture on the sides of a ship's hold. Baxter v. Leland, 1 Abb. Adm. 348, Fed. Cas. No. 1,124 (1848).

ROLLING OF SHIP, causing bilge water to wet cargo. Crosby v. Grinnell, Fed. Cas. No. 3,422 (1851).

RATS, gnawing hole in vessel, which lets in water. Dale v. Hall, 1 Wils. 281 (1750); Pandorf v. Hamilton, 17 Q. B. D. 670 (1886); The Euripides, 71 Fed. 728 (1896). Rats eating cargo. Laveroni v. Drury, 8 Ex. 166 (1852); Kay v. Wheeler, L. R. 2 C. P. 302 (1867).

COCKROACHES, eating cargo. The Miletus, 5 Blatchf. 335, Fed. Cas. No. 9,545 (1866).

[4] The statement of facts and parts of the opinion are omitted. Haines, J., delivered a concurring opinion.

uted to the loss. Upon the like principle, if the carrier's dock be imperfect, a loss arising by the influence of a storm acting upon the imperfection, and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone; it is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed, or believed not to be dangerous, occasioned the injury, since no act that could be called the act of God had intervened, it is undeniable that the carriers would be liable. In this case, an act of God did intervene, and was instrumental in producing the loss; but it was not the sole or proximate cause of the loss. The defendants themselves insist and assume, in the charge they desire, that the storm itself did not do the injury. Had not another instrument concurred, which proceeded from the active or passive agency of man, and for which man is responsible, there would have been no loss.

In the case of Trent Nav. Co. v. Wood [ante, p. 317] the carrier's vessel sank by driving against a concealed anchor in the river, which belonged to another vessel, to which no buoy was attached, as there ought to have been. The plaintiffs recovered, and although it seems to have been considered that there was some negligence on the part of the master, it appears from the remarks of the judges, whose opinions are but shortly reported, that it was held that this loss was occasioned, partly by the act of man, and came within the principle of a loss by robbery, for which the carrier was responsible, whether in fault or not.

A later case of Smith v. Shepherd, Abbott on Ship. pt. 3, c. 4, § 1, was a case where the loss happened at the entrance of the harbor of Hull. There had formerly been a shelving bank, which was rendered precipitous by a recent flood, and a vessel had sunk there which had a floating mast tied to her. The defendant's vessel struck this mast, and was thereby forced on the bank, and in consequence of the change that had taken place by means of the flood, the loss occurred. Evidence offered to show that there had been no actual negligence was overruled, and it was held that the loss having been in part produced by the floating mast which was placed there by human agency, the fact that the act of God in changing the bank was also instrumental, could not be considered as making that act the immediate cause of the loss, and therefore formed no excuse.

In the case of Camden & Amboy Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488, baggage of one of the passengers, the transportation of which was paid for, was injured by the breaking of a rope, by means of which it was being hoisted from the steamboat to the wharf at Bordentown, and it was held that the company were answerable as common carriers, although the defect was unknown to their agents and was not discoverable on inspection, and the loss happened without any culpable negligence or want of care. The

same principle was decided in the case of De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523.

On behalf of the defendants, the now plaintiffs in error, much reliance has been placed on the case of Amies v. Stevens, shortly reported as follows: [The learned judge here quoted from the report of that case, ante, p. 345.] * * * It having been held as a matter of fact, that the hoy was in proper order and fit for the business in which it was employed, this case decides that a sudden gust of wind which sunk it while in the act of passing through a bridge, against which, as it would seem, the wind drove it, was to be regarded as an act of God, for which the carrier was not responsible, and there can be no doubt of the correctness of the decision. It being necessary for the hoy to pass through the bridge to make the contemplated voyage, if a proper time was taken to do it, a sudden storm driving it against the bridge, was just as clearly the proximate cause of the loss as a sudden storm at sea which should drive a ship upon a rock.

The application of it to the present case, which counsel seek to make, is that the bridge being the work of man, there was here the intervention of human agency, and that the striking of the hoy against it was therefore as much the immediate or proximate cause of the loss, as the striking of the barge, in the case before us, against the timber projecting out of the bulkhead. Had there been no negligence on the part of the defendants in this case, and a sudden storm had driven their barge against a properly constructed bulkhead, and thus occasioned the loss, the cases would have been alike. But the defendants, admitting such negligence as if the damage had been occasioned by the vessel being driven against the bulkhead where it was perfect, would have rendered them liable, insist that the loss did not thus happen, but that it happened by the storm driving out the water from the dock, and thus bringing the vessel into contact with a timber not otherwise dangerous. There is a plain distinction between an injury caused by a sudden gust of wind driving a vessel against a bridge, or bulkhead, or other erection, which although the work of man, is properly placed and built for the public benefit, and one which is occasioned by the same gust driving her against something which is there by the fault or at the risk of the owner of the vessel or of a third person. In the former case, the injury is to be attributed, so far as regards the question who is responsible for it, solely to the gust of wind—the act of God; while in the latter there is the intervention of an act of man, which concurs in producing it, and against which the carriers undertake to insure.

It is, however, urged for the defendants that this was a public dock, over which they had no control, but which belonged to the city of New York, and was regulated by the public authorities thereof; and also that if they are to be held responsible for its efficiency, it ought not to be taken for granted that the projecting timber was of such a character as to be considered a defect, for the consequences of which

they are to suffer. Whether it was a public or private dock, it seems to me, can make no difference. When the defendants rented it, or obtained leave from the city to use it for the purposes of their private business, it became as much their private property, so far as persons transacting business with them were concerned, as if they had owned it. That a timber projecting nearly a foot from the face of the bulkhead, and capable of making a hole through a well built vessel at one blow, as defendants say this did, was a defect, even although it was below the ordinary low water mark and not capable of doing injury at common tides, seems to me too obvious to be a subject of doubt.

[The learned judge then argued that the carrier was negligent in leaving the barge in an exposed situation during the storm, that the evidence would not warrant a finding that this negligence did not contribute to the loss, and that consequently the carrier had not shown that the loss was due to those circumstances which he relied on as relieving him from liability, rather than to his own proved neglect.]

Judgment for plaintiffs affirmed.[5]

[5] A vessel was lying at a pier in Albany, when from an unexplained cause a fire broke out in the city a quarter of a mile away. About an hour later a sudden gale arose, carried burning fragments of wood to a great distance in the direction of the vessel, and caused an extensive conflagration, which in a few minutes reached and destroyed her, with her cargo. It was held that, though the gale was an act of God and brought the fire irresistibly to the vessel, the carrier was liable for the loss. Parsons v. Monteath, 13 Barb. (N. Y.) 353 (1851); Miller v. Steam Nav. Co., 10 N. Y. 431 (1853).

A railroad express car was overturned by a gale. It caught fire from a lighted stove in the car, and its contents were consumed. The carrier was excused. Blythe v. Denver & R. G. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403 (1890).

A fire burned in the woods near a town for several days, but had been so far subdued that no especial anxiety was felt. A tornado drove the fire toward the town, and in spite of all efforts the town was burned, together with loaded cars at a railroad station. The carrier was excused. Pennsylvania R. R. Co. v. Fries, 87 Pa. 234 (1878).

A sloop was sunk in the Hudson river in a squall. Less than three days afterward, a steamboat, carrying horses, ran at night without negligence upon her mast, which was a few feet above water, and the horses were drowned. The carrier was held liable. Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292 (1864).

A train was derailed by a washout caused shortly before by the overflow of a neighboring sheet of water because of an extraordinary fall of rain. The carrier was excused. Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 554 (1879).

A train was wrecked by the sliding of earth upon the track from the side of a cutting, by reason of the fact that it had been loosened by a rainfall not exceptional in character. The carrier was held liable. Gleeson v. Va. Midland Ry., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458 (1891).

In Central of Georgia Railway Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170 (1905), a car was wrecked by the engineer's running the engine against it at high speed. It was contended that the engineer had suddenly gone insane. Lumpkin, J., said: "Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse; would it be contended that, by showing insanity on his part, the taking became the act of God? * * * Sudden death, or sickness of such a character as to render action impossible, may sometimes excuse nonaction. But tortious action does not become the act of God because the person acting may be sick."

## MORRISON v. McFADDEN.

(District Court of Alleghany County, Pennsylvania, 1850. 3 Am. Law J. [N. S.] 462.)

This was an action of assumpsit on a bill of lading for damage done to goods delivered by the plaintiff to the defendant, to be carried by the Pennsylvania Canal. The bill of lading was dated October 1, 1847. After the goods were started on the way, and when they were on the Juniata portion of the canal, October 7th, there came a great storm of rain, which lasted near two days and caused an unprecedented rise in the waters of the Juniata. When the defendant's boat arrived at Piper's dam, it was considered unsafe to attempt to cross. The crew, therefore, lay up on the level below the dam, and fastened their boat to a canal bridge immediately below the dam. The water continued rising until about midnight, when Piper's dam gave way, and shortly afterwards the bridge to which the boat was fastened was carried off, and the boat with it. Some of the goods were recovered, but in a damaged condition.

It appeared by the evidence that the defendant's boat had two horses, and that one of them was lame when they started, and that by reason of this the defendant's boat had lost eight or ten hours' time, and that, had it not been for this, the boat would have arrived at Piper's dam early enough to be able to cross it, and then the accident would have been avoided.

LOWRIE, J. [charging the jury].* * * * If the loss in the present instance arose from an extraordinary flood and the consequent breaking of a canal dam, and this was the sole cause of the loss, and if in the difficulties in which they were placed there was no want of diligence and skill on the part of the crew, the carrier is excused.

That this was an extraordinary flood, and that it caused the breaking of the dam, is admitted. The next thing to be ascertained is whether or not this was the sole cause of the loss. On this part of the case the plaintiff insists that the negligence of the defendant in having a lame horse in his team, whereby the boat was so detained as to fall into the danger, and whereby the movements of the crew were embarrassed after they fell into the danger, was one of the causes of the accident. * * *

Supposing that the lameness of the horse caused the delay by which the boat was brought into a position which by the concurrence of an extraordinary flood became fatal; what effect has this upon the excuse offered by the carrier? In this question it is assumed that the proximate cause of the disaster was the flood, and that the fault of the carrier in having a lame horse was a remote cause; that the immediate cause of the loss has the character of an inevitable accident, but that

* Parts of the charge to the jury are omitted.

this cause could not have operated so as to affect the defendant had it not been for the remote fault of starting on his voyage with insufficient horse power. The question then is: Does the law transfer this fault so as to make the delay consequent upon it an element in testing the inevitableness of the disaster at Piper's dam? If it does, the defendant is without excuse.

In any other than a carrier case, this question would be at once decided in the negative; for the general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and on this account may be foreseen by ordinary foresight, and not for those which arise from a conjuncture of his fault with other circumstances that are extraordinary in their character.

Thus, if a blacksmith pricks a horse by careless shoeing, ordinary foresight might anticipate lameness and some days or weeks of unfitness for use. But it could not anticipate that by reason of that lameness the horse would be delayed in passing through a forest until a tree fell and killed him, or broke his owner's back, and this would be no proper measure of the blacksmith's liability. * * *

Now there is nothing in the policy of the law relating to common carriers that calls for any different rule as to the consequential damage to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those which are remote and extraordinary. * * *

Where a carrier is guilty of delay in transporting goods, his liability is to pay for the delay. This liability is not changed by the subsequent destruction of the goods by reason of extraordinary circumstances within the influence of which they were brought by that delay. The discovery of new and remote consequences does not change the liability which attached with the happening of the fault. The law does not make this delay an element in testing the inevitableness of the final disaster. Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521.

These principles allow us to proceed at once to the consideration of the actual disaster. It may, perhaps, be assumed that the defendant's boat properly lay up for the night on the level below Piper's dam, and we are to examine what degree of care was required of them there, with the storm upon them and the river rising rapidly.

The law requires of the carrier, under such circumstances, ordinary care, skill, and foresight. This is usually defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. Of course this care is increased as difficulties increase. In other words, in great danger, great care is the ordinary care of prudent men.

Did the defendant exercise ordinary care in stopping so near to Piper's dam? We should guard against that ex post facto wisdom which some of the witnesses have so abundantly displayed. After seeing how the storm had operated, the defendant's hands were per-

haps as wise as the witnesses. We are seeking to learn whether, by ordinary forecast, the defendant could have foreseen the accident and the means of avoiding it.

Many witnesses testify that it is usual for boats to stop at that very spot and to fasten to that very bridge in time of high water. This is evidence of ordinary care.

None question the safety of the boat in that position, had Piper's dam not given way. This would seem to be conclusive evidence of proper prudence in the selection of the place to lie in, unless there was a want of proper foresight as to the height of the flood and the strength of Piper's dam.

Did ordinary foresight demand an anticipation of this unprecedented flood and of the breaking of the dam? We should be careful to distinguish between ordinary foresight and a timid apprehension of approaching danger. This latter quality is incompatible with the cool courage and experienced forecast of a good boatman, and would unfit him for the practical duties of his calling.

We can scarcely expect a greater foresight of the impending flood from boatmen on the canal than we should from the inhabitants who have lived a lifetime in that locality, and crowds of witnesses testify that it was entirely unexpected by the inhabitants.

The dam was erected by the state, under the direction of skillful engineers. It had either withstood the flood of 1839, or been built under the guidance of the experience derived from that flood. It would seem to be a timid apprehension, or an extraordinary foresight, that would anticipate its destruction, and neither of these was demanded of the defendant. If, up to this point of time, you discover no want of care, then you will consider the circumstances immediately after the dam gave way. And if in any part of that eventful evening you discover any negligence on the part of the defendant's crew, other than the delay before spoken of, that contributed to the disaster, you will find for the plaintiff the value of his goods. If otherwise, you will find for the defendant.

Verdict for the defendant.[7]

[7] Judgment affirmed as to counts here discussed, but reversed on another point. Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695 (1852). Compare the following passage from the opinion of McClain, C. J., in Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882 (1906): "Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some

## SECTION 2.—ACT OF THE PUBLIC ENEMY

### BLAND v. ADAMS EXPRESS CO.

(Court of Appeals of Kentucky, 1864. 1 Duv. 232, 85 Am. Dec. 623.)

ROBERTSON, J. To a petition by Arthur Bland against the "Adams Express Company," charging the nondelivery, according to consignment, of a package containing $2,279, confided by him, at the city of Louisville on the 10th day of May, 1862, to said company, as a common carrier, to carry from said city to his consignee at the city of Nashville, it filed an answer alleging that its agent forthwith placed the said package with all its said contents in its iron safe on the railroad train then departing from Louisville to Nashville; that, on the same day, John Morgan and his band of Confederate soldiers, on the way, near Cave City, attacked the train, burnt most of the cars, and, by irresistible armed force, robbed the safe of the said package and all its contents; and that no portion of the money so abstracted had

casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation." Compare, also, Read v. Spaulding, ante, p. 64, and cases cited in notes thereto.

In Nugent v. Smith, L. R. 1 C. P. D. 423, 437 (1876), Cockburn, C. J., said: "In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can reasonably be required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God. * * * I find no authority for saying that the vis major must be such as no amount of human ability could have prevented, and I think this construction of the rule erroneous."

Where the loss is directly caused by a happening of the class called act of God, and the carrier has used the care of a reasonably prudent man, it does not suffice to render him liable that he might have avoided it by a degree of care not inconsistent with the practical conduct of his business. Gillespie v. St. Louis, etc., Ry. Co., 6 Mo. App. 554 (1879); Southern Pacific Co. v. Schuyler, 135 Fed. 1015, 68 C. C. A. 409 (1905).

Where a track is washed away by a flood so violent that it would have washed away the strongest track, the railroad is not made liable by the fact that its track was so built that it would have been washed out by a storm not of exceptional violence. Gillespie v. St. Louis, etc., Ry. Co., supra.

If the carrier's failure to exercise due care contributes to the loss, he is liable, although the immediate cause was an act of God; Dibble v. Morgan, 1 Woods, 406, Fed. Cas. No. 3,881 (1873), goods abandoned in hurricane; Wabash, etc., R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823 (1906), failure to observe warning of Weather Bureau. If the evidence is evenly balanced as to whether the carrier exercised due care, authorities conflict as to who is entitled to the verdict. See 6 Cyc. 521; Carriers, 9 Cent. Dig. § 579, Dec. Dig. § 132.

been rescued or restored. These facts having been sufficiently proved, the circuit judge, to whom the law and the facts were submitted, dismissed the petition. And this appeal seeks the reversal of that judgment.

Public policy, and consequently the law, holds common carriers to a peculiar responsibility, extremely stringent, admitting no excuse for the loss of goods except an act of God or of a public enemy, which could not, by any proper care or available force, have been overcome or averted. No other human force than that of a public enemy will exonerate the carrier, because, otherwise, he might fraudulently muster or combine with a force to rob himself.

The only question in this case is: Was Morgan's band, in the technical sense, a public enemy? And the answer depends on whether the strife in which they were fighting is a civil war. War is either international or civil, foreign or domestic. Insurrection, however violent or formidable, is not war. Civil war is preceded by insurrection, which becomes magnified and matured into war in the legitimate sense. And when so characterized, the parties are belligerents, and respectively entitled to belligerent rights. The American Revolution of 1776 commenced in insurrection. But the insurgent colonies soon became belligerent states. By the Declaration of Independence civil war was inaugurated, as often and authoritatively recognized and adjudged. After that transforming event, the American resistance was rebellion no longer, but war for liberty. The struggle in which the United States are now engaged against the seceding states, is more stupendous and quite as eventful. It is to save that which the war of independence achieved. And history records no civil war more flagrant or gigantic than that in which our country is now engaged. If this be not war, what is war, and when or where did it ever rage and desolate and destroy? It has been so treated at home and abroad—by our own government in all its departments, as well as by foreign governments; and if it be war now, it was as certainly war, and as much war, on the 10th of May, 1862.

Wherefore the judgment is affirmed.[8]

[8] See, also, Morse v. Slue, ante, p. 313.

When goods in the hands of a carrier were seized by Confederate forces within territory over which the Confederacy had established and was maintaining an actual government, the carrier, at least if his domicile and route lay within such territory, could not, even in a Union court, maintain the defense of a taking by public enemy. Nashville, etc., R. Co. v. Estes, 7 Heisk. (Tenn.) 622, 24 Am. Rep. 289 (1872); Patterson v. North Carolina R. Co., 64 N. C. 147 (1870).

On the other hand, hostile acts of the Union forces in Confederate territory were acts of a public enemy. Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256 (1870). Cf. Seligman v. Armijo, 1 N. M. 459 (1870); Spalds v. N. Y. Mail S. S. Co., 3 Daly (N. Y.) 139 (1869); Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208 (1895).

In Holladay v. Kennard, 12 Wall. 254, 20 L. Ed. 390 (1870), it was held that a common carrier was not liable for the acts of a band of tribal Indians engaged in hostilities during the War of the Confederacy.

The Marshal's Case, Y. B. 33 Hen. VI, 1, pl. 3 (1455), printed in Beale's

## SECTION 3.—QUALITY OF THE THING CARRIED

### EVANS v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, 1872. 111 Mass. 142, 15 Am. Rep. 19.)

Tort against common carriers to recover for injuries to the plaintiff's horse. At the trial in the superior court before Rockwell, J., the plaintiff offered evidence that he delivered to the defendants to be carried on their road two horses, which were kept and used as a span; that he saw them placed and fastened by their halters at the end of a car in separate corners; that when the horses arrived they were in the same position, but one was seriously injured on his hind legs, and his halter rope was hitched so tightly around his lower jaw as evidently to have caused him pain; that the injuries were caused by kicks from the other horse; and that the horses had been previously kind and well-behaved. * * *

Cases on Carriers, was an action against the marshal of the King's Bench for the escape of a prisoner committed under a judgment in favor of the plaintiff. It was pleaded that enemies of the king broke open the prison and carried off the prisoner against the marshal's will, but without stating who or of what country they were.

"Choke: If enemies from France or other enemies of the king were here, the marshal would be discharged; as if they had burned a house of a tenant for life, he should be discharged of waste; or otherwise if the house were burned by a sudden tempest, then he would be discharged; so here.

"DANBY, J. In your case of the king's enemies and of the sudden tempest it is right; for then there was no remedy against any one; but it is otherwise where subjects of the king do it; for there you may have action against them.

"Choke: Sir, the captain is dead, and all the others are unknown.

"PRISOT, C. J. If they were subjects of the king, they could not be called enemies of the king, but traitors; for enemies are those who are out of his allegiance; but if they were alien enemies it would be a good plea without any doubt. But if there were twelve or twenty subjects of the king, and unknown, and one night they broke open the prison and took them out, etc., in that case the marshal shall be charged for his negligent guard; so here. But if it were by a sudden accident with fire, and the prison were burned, and they escaped, perhaps it is otherwise. * * *

"Choke: Then we say that there were 4,000 Scots and other enemies of the king with the other traitors, etc.

"DANBY, J. Then you ought to allege the matter more specially, and some of their names. Et adjournatur."

In Marsden's Select Pleas in the Court of Admiralty (Selden Society), it appears that in 1571–72 two cases were decided in the Court of Admiralty involving the liability of a carrier over sea for loss by robbery. In one, a defense of capture by pirates was held good. Guallerotti c. Utwicke, vol. 2, p. lxx. In the other, a suit against the master of a ship for failure to deliver 400 ducats intrusted to him for carriage, a defense that the ship was wrecked by tempest and pillaged by wreckers was held bad. Bodacar c. Block, vol. 2, p. 146.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.[9]

AMES, J. According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well-known exception of the act of God and of public enemies) the goods intrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables, and other perishable articles; the fermentation, evaporation, or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods—are matters to which the implied obligation of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492a, 576. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected;[10] but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers.[11] They thereby became responsible for the safe treatment of the animals, from the moment they received them until the carriages in which they were conveyed were unloaded. Moffat v. Great Western Railway Co., 15 Law T. (N. S.) 630. They would be unconditionally liable for all injuries occasioned by the

[9] Part of the statement of facts is omitted.

[10] "There may have been an accidental jerk at a curve of the line, or a jolt of the train by sudden stoppage; or, on the other hand, possibly (though there is no evidence of it) the animal may have been the cause of its own injuries by some intrinsic properties of its own nature." Pigott, B., in Kendall v. London & S. W. Ry. Co., L. R. 7 Ex. 373 (1872).

[11] Acc. Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 425 (1872). Contra: Heller v. Chicago, etc., R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541 (1896).

In Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379 (1829), it was held that the exceptional liability of a common carrier does not exist in the carriage of slaves. Marshall, C. J., said: "A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked, in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods."

improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well-known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other.

If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. Clarke v. Rochester & Syracuse Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partition between them, and by kicking each other some of them are killed, the carrier will not be held responsible. Laurence v. Aberdein, 5 B. & Ald. 107; Story on Bailments, § 576; Angell on Carriers, 214a. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of the injury is one of fact for the jury. Hall v. Renfro, 3 Metc. (Ky.) 51. And in a New York case, Conger v. Hudson River Railroad Co. [post, p. 374, at 377], Mr. Justice Woodruff says, in behalf of the court: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us, therefore, that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precautions to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendants were entitled to a verdict. That is to say, they might be held to great vigilance, foresight, and care, but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plaintiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to the instruction that if the injuries were caused by the fault

or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. Smith v. New Haven & Northampton Railroad Co., 12 Allen, 531, 90 Am. Dec. 166. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. Kendall v. London & Southwestern Railway Co., L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

It appears to us, also, that the instruction actually given was not a full equivalent for that which was requested, and which, as we have seen, should have been given. It was not necessary to the defense to show that the injury was caused in "an outburst of viciousness." The proposition should have been stated much more generally, and the jury should have been told that if from fright, bad temper, viciousness, or any other cause without fault on the part of the defendants, the horses became refractory and unruly, and the kicking and injury were occasioned in that manner, it was an unavoidable accident, for which the defendants were not liable.

Exceptions sustained.[12]

[12] Acc. Clarke v. Rochester, etc., R. Co., 14 N. Y. 541, 67 Am. Dec. 205 (1856); Ill. Cent. R. Co. v. Brelsford, 13 Ill. App. 251 (1883); Louisville, etc., Ry. Co. v. Bigger, 66 Miss. 319, 6 South. 234 (1889); Nugent v. Smith, L. R. 1 C. P. D. 423 (1876).

In Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42 (1872), Doe, C. J., said: "The warranty he [the shipper] desires is of the safety of the transportation, not of the absolute preservation of his property from its own action."

It has been held that a common carrier is not liable for loss by evaporation, though exceptionally great. Janney v. Tudor Co. (D. C.) 3 Fed. 814 (1880). Nor for excessive leaking from wooden barrels containing lard, melted by hot weather. Nelson v. Woodruff, 1 Black, 156, 17 L. Ed. 97 (1861). Nor for the bursting of a cask of molasses by fermentation during unloading. Faucher v. Wilson, ante, p. 37. Nor for the escape of a bullock from a car reasonably secure. Blower v. Gt. W. Ry. Co., L. R. 7 C. P. 655 (1872). Nor for the escape of a dog by slipping a collar, apparently sufficient, which he wore when delivered to the carrier. Richardson v. N. E. Ry. Co., L. R. 7 C. P. 75 (1872), semble; Kaplan v. Midland R. Co. (Sup.) 88 N. Y. Supp. 945 (1904). Nor for the burning of goods on fire when delivered. Coweta County v. Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018 (1908). Compare Warden v. Greer, 6 Watts (Pa.) 424 (1837), barrels known to be leaky from loss of hoops, accepted by carrier and not recoopered.

## BEARD v. ST. LOUIS, A. & T. H. RY. CO.

(Supreme Court of Iowa, 1890. 79 Iowa, 527, 44 N. W. 803.)

Action to recover damages for injury sustained, through negligence of defendant, to a large quantity of butter shipped by plaintiffs from West Union, Iowa, to New Orleans, La.; the butter being carried over a part of the route by defendant. The cause was tried without a jury, and judgment was entered for defendant. Plaintiffs appeal.

BECK, J.[13] * * * Counsel insist that the evidence shows that it was understood that the butter should be carried through from St. Louis to New Orleans in common cars, and that various facts appearing in the evidence authorize such an inference. We cannot assent to this proposition. It may be admitted that the evidence shows no specific agreement for any specific class of cars entered into between the transfer company and defendant. The butter was delivered to defendant, and nothing said about the character of the cars to be used in its transportation. It may be admitted that the rate of charges named was the rate for common cars. But there was no agreement that the butter should be transported in such cars, and that due care should not be exercised in its transportation to protect it from injury on account of the heat. The carrier was bound to exercise the diligence demanded by law for the safety of the butter, and its protection from injury. It was bound to use the degree of diligence which a carrier must exercise for the safety of the goods he carries. It was bound to provide refrigerator cars, or other cars, in which ice could be and should be used, to protect the butter from the heat; and until such cars could be provided it was required to put the butter in cold storage. See Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381. This discussion leads us to the conclusion that the judgment of the superior court ought to be reversed.[14]

[13] Part of the opinion has been omitted.

[14] Acc. Wing v. N. Y. & Erie R. Co., 1 Hilt. (N. Y.) 235 (1856), apples frozen by exposure to winter weather; Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665, 29 N. W. 772 (1886), hogs killed by crowding together near doors of car, which carrier might have prevented; Railroad Co. v. Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42 (1903); Loeser v. Railway Co., 94 Wis. 571, 69 N. W. 372 (1896); Cash v. Wabash R. Co., 81 Mo. App. 109 (1899). Compare Mo. Pac. Ry. Co. v. Fagan (Tex. Civ. App.) 27 S. W. 887 (1894), mode of transportation ordinarily proper injured mares because, without carrier's knowledge, they were with foal.

For burden of proof as to carrier's fault where an article during transportation receives damage of a kind to which its inherent quality renders it susceptible, see Dow v. Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945 (1892); McCoy v. K. & D. M. R. Co., 44 Iowa, 424 (1876); Zerega v. Poppe, Abb. Adm. 397, Fed. Cas. No. 18,213 (1849); Hance v. Express Co., 48 Mo. App. 179 (1892).

## LISTER v. LANCASHIRE & Y. RY. CO.

(High Court of Justice, King's Bench Division. [1903] 1 K. B. 878.)

Appeal from the Bradford County Court.

The plaintiff employed the defendants as common carriers to carry an engine from his yard to a neighboring town on their line. The engine was on wheels with shafts to draw it, and had been purchased by the plaintiff secondhand a few months before. The defendants sent two men, two boys, and two horses for the purpose, and the men and boys were competent and the horses proper for the purpose. The horses were harnessed to the engine, which was drawn out of the yard, and whilst they were proceeding along the road one of the shafts broke, the horses took fright, became unmanageable, and upset the engine, which was damaged in consequence. The shaft was rotten at the point where it broke, but this was not known either to the plaintiff or the defendants, and could not have been discovered by any ordinary examination. The County Court judge was of opinion that the rule that a common carrier is excused from liability for damage, if it be caused by the inherent vice of the thing carried, is limited to cases in which the inherent vice itself directly causes the damage without any contributory act done by the carrier, as in the case of a vicious animal injuring itself, or overripe fruit becoming damaged by the pressure of its own weight; and he accordingly held that, as the shaft would not have broken but for the strain put upon it by the defendants' own act, its defective condition afforded no excuse.

The defendants appealed.

Scott Fox, K. C., and R. Watson, for the defendants. The limitation on the liability of a common carrier is laid down by Mellish, L. J., in Nugent v. Smith (1876) 1 C. P. D. 423, at page 441, thus: "A carrier does not insure against acts of nature, and does not insure against defects in the thing carried itself; but in order to make out a defense the carrier must be able to prove that either cause taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss." The County Court judge thought that in order to establish that the inherent defect was the "sole and direct" cause of the loss within that rule it was necessary to show that the damage would equally have happened if the thing had not been carried at all. Therein he was wrong. The inherent defect remains the sole and direct cause, notwithstanding that it is rendered active by the act of the carrier, if that act was one which it was intended by the consignor that the carrier should do, or which it was reasonably necessary that the carrier should do, in the course of the carriage. The self-inflicted injury of a restive animal or the damage caused to overripe fruit in the course of transit by railway is contributed to by the act of the carriers, inasmuch as they cause the noise that frightens the animal or the vibration that shakes the fruit together; but the noise

and vibration are reasonably necessary and part of the ordinary incidents of carriage, and for that reason the carriers are excused. Here it was intended that the defendants should, or at all events contemplated that they would, carry the engine through the street in the way in which they did—by harnessing horses to the shafts.

Lord ALVERSTONE, C. J. I am of opinion that the County Court judge has put a limitation upon the rule which is not justified by any authority. It must be taken that the engine was being conveyed in the ordinary way in which a common carrier would have conveyed it, and therefore no point can be made as to there being a possible alternative and safer mode of carriage. It may be that if there is no evidence of intention by the parties as to how the thing is to be carried, and there are alternative modes of carriage, one of which will give play to an inherent defect in the thing carried and the other of which will not, the carrier will be responsible if he adopts the former mode and damage results therefrom, unless indeed the adoption of the safer mode would involve the taking of precautions which it would be altogether unreasonable to require him to take. But that is not the case here. It is obvious that all parties intended that the engine should be taken to the station on its own wheels. The County Court judge, in thinking that the rule as to the nonliability of a common carrier for damage caused by an inherent defect in the thing carried was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went much too far. When once you arrive at the fact that the thing is being carried in the ordinary way, and every precaution has been taken consistent with that mode of carriage, and the accident happens from the unfitness of the thing for that mode of carriage, the carrier is not responsible.

WILLS, J. I am of the same opinion.

CHANNELL, J. I agree. I think the proposition may be stated thus: The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases.

Appeal allowed.

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## GILLESPIE v. THOMPSON.

**(Court of Queen's Bench, 1856. 6 El. & Bl. 477, note b.)**

This was a special case, in which the only question was whether the defendant, the shipowner, was answerable to the plaintiff, the shipper of goods, under the ordinary bill of lading, for damage sustained by those goods in consequence of the leakage of turpentine from casks belonging to third parties, no negligence being imputed to the defendant.

Joseph Brown, for the plaintiff, was not called upon to argue.

Manisty, for the defendant, admitted he could not support the defense.

PER CURIAM (Lord CAMPBELL, C. J., and WIGHTMAN, ERLE, and CROMPTON, JJ.). The case is too clear for argument.

Judgment for the plaintiff.

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## THE COLONEL LEDYARD.

(District Court, D. Massachusetts, 1860. 1 Spr. 530, Fed. Cas. No. 3,027.)

SPRAGUE, District Judge.[15] This libel, in rem, seeks to recover for damage done to a quantity of flour, by the effluvium of spirits of turpentine. In June, 1859, this vessel was at New Orleans, taking freight for Boston, as a general ship. The libelants, on the 24th of that month, put on board of her 354 barrels of sound flour, and took a bill of lading, by which the carrier was bound to deliver the same to the libelants at Boston, in like good order as when received, "the dangers of navigation and fire only excepted." The flour was stowed between decks aft. There were 190 barrels of spirits of turpentine in the forward part of the lower hold. The cargo seems to have been, in other respects, properly stowed, and the hatches of the lower hold well secured; and during the passage, the hatches of the upper deck were taken off during the daytime, for ventilation. On arriving at Boston, the flour was found to have been penetrated by the effluvium of the spirits of turpentine, and its market value thereby diminished.

It is not contended, on behalf of the claimants, that this damage arose from the perils of navigation, or of fire, so as to come within the exception in the bill of lading. But it is insisted, that there is an established usage to take spirits of turpentine and breadstuffs together, as portions of the cargo of a general ship, from New Orleans and elsewhere, and that, in this instance, the carrier took all proper care, and performed his whole duty. It is incumbent upon the shipper, to see that his goods are of such a character, and in such condition, that they will bear the voyage upon which he sends them, if conducted in the usual and accustomed manner. If, therefore, his goods are deteriorated, because they will not bear the established mode of stowage, or the companionship of other articles, which, from the known usage of trade, he may reasonably suppose may constitute a part of the cargo, the shipper must bear the loss, and not the carrier.[16] If, therefore, the

[15] Part of the opinion is omitted.

[16] Choate, J., in Mainwaring v. Bark Carrie Dunlap (D. C.) 1 Fed. 874 (1880): "The rule of law seems to be well settled that the ship is not responsible for injury necessarily resulting to the goods of one shipper, by a general ship, from their being carried in the same vessel with the goods of other shippers, which, by usage, are a proper part of the same general cargo." Acc. Baxter v. Leland, 1 Blatchf. 526, Fed. Cas. No. 1,124 (1848), affirmed 1 Blatchf. 526, Fed. Cas. No. 1,125 (1849) flour damaged by vapor of drainage

claimants had succeeded in proving the usage which they set up, it would have been a good defense; but their proof has wholly failed. The evidence does not show that it has been usual, on any voyages, to take spirits of turpentine, and breadstuffs, as parts of the same cargo, and as to New Orleans, it is but recently that spirits of turpentine have been shipped from that port, in any manner. The carrier has not shown any usage which would warrant him in putting spirits of turpentine on board of his vessel, with the flour, if the former would be deleterious to the latter, and the evidence shows conclusively that it was.

The numerous witnesses for the libelant testified positively that the flour was injured by the spirits of turpentine, and the scientific witness called for the claimant, on that point, rather confirmed than impaired their testimony. The flour having been damaged on the voyage, and it not appearing to have arisen from any inherent principle of decay, or from its character or condition being such as not to bear the voyage, as usually conducted, nor from the danger of the seas, the carrier must be responsible. * * *

from sugar casks; Sabbich v. Prince, Fed. Cas. No. 12,192 (1874), mulberry trees killed by fumes of leakage from casks of wine; The Martha, Olcott, 140, Fed. Cas. No. 9,145 (1845); The T. A. Goddard (D. C.) 12 Fed. 174 (1882), semble; Hills v. MacKill (D. C.) 36 Fed. 702 (1888), semble. Compare The Freedom, L. R. 3 P. C. 594 (1871); Alston v. Herring, 11 Ex. 822 (1856). "If the shipowner chooses to carry a number of different articles together, he does so at his own risk, and, though he may have used all possible care in stowing them, he is liable for the damage they may cause to one another." Carver, Carriage by Sea, § 95.

Compare, also, The Powhattan (C. C.) 12 Fed. 876 (1882), cattle died of heat because put, with the shipper's consent, in the between-decks; The Lizzie W. Virden (C. C.) 8 Fed. 624 (1881), almonds damaged by odor of petroleum carried on previous voyage; The Thames, 61 Fed. 1014, 10 C. C. A. 232 (1894), flour damaged by oil, because ship's hold had insufficient ventilation; Bearse v. Ropes, 1 Spr. 331, Fed. Cas. No. 1,192 (1856), hemp damaged by oil leaking from casks in bad condition.

For damage from other cargo which might have been avoided by different stowage the carrier was held liable in The Newark, 1 Blatchf. 203, Fed. Cas. No. 10,141 (1846), The Glamorganshire (D. C.) 50 Fed. 840 (1892), and Lazarus v. Barber (D. C.) 124 Fed. 1007 (1903).

For injury from such sweating or dampness as usually occurs in the confinement of a ship's hold the carrier is not liable. The Live Yankee, Fed. Cas. No. 88 (1854); Baxter v. Leland, Abb. Adm. 348, Fed. Cas. No. 1,124 (1848); Clark v. Barnwell, 12 How. 272, 13 L. Ed. 985 (1851), semble; Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020 (1857) Contra: Cameron v. Rich, 4 Strob. (S. C.) 168, 53 Am. Dec. 670 (1850). But for injury from the splashing of bilge water, such as is ordinarily in a vessel's hold, during the ordinary rolling of the vessel, the carrier is liable. Crosby v. Grinnell, Fed. Cas. No. 3,422 (1851); Bearse v. Ropes, 1 Spr. 331, Fed. Cas. No. 1,192 (1856).

## SECTION 4.—ACT OF THE SHIPPER.

### CONGAR v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, 1869. 24 Wis. 157, 1 Am. Rep. 164.)

The plaintiffs shipped, by defendant's road, trees and other nursery stock from Whitewater, in this state, directed to "Iuka, Iowa," the consignees being resident in a village of that name in Tama County, Iowa. At Chicago, the goods were shipped by defendant's agents, by the Chicago, Burlington & Quincy Railroad Company, and at Quincy were transferred to the Quincy & Missouri Railway, by which they were transported to Iuka, in Keokuk county, Iowa. In consequence of this mistake, they are alleged to have become worthless, and this action was brought to recover damages. Certain averments of the complaint and answer will be found recited in the second paragraph of the opinion, infra. A demurrer to the answer was sustained, and defendant appealed.

DIXON, C. J. The decision of the court below, as shown by the written opinion of the learned judge found in the printed case, turned upon the point that, for the purpose of charging the company with negligence in shipping the goods over the wrong road, notice to any of its agents was notice to the company. [The learned judge then discussed the correctness of this holding, and decided that for the purpose of determining whether the carrier was guilty of actionable carelessness in sending the goods to Iuka, Keokuk county, it was immaterial that some of its servants in a different department of its business knew of the existence of Iuka, Tama county.]

The complaint charges that the place called Iuka, in Tama county, Iowa, to which the goods were intended to be sent, was known to the agents of the company residing and doing business along the line of its road in the state of Iowa, and that the station where such goods were to be deposited was Toledo. The answer alleges that the same place was unknown to the officers and agents of the company at Chicago; that they were informed that said Iuka was situated in Keokuk county, in the state of Iowa, and near the line of the Burlington & Missouri Railroad; that they examined a map of Iowa used by shippers, and kept in the office of defendant, for the purpose of ascertaining where said Iuka was situated; and that said map represented said Iuka as being in Keokuk county aforesaid. The answer further alleges that the goods were directed to "C. E. Cox, Iuka, Iowa," without giving the name of the county, or other directions to indicate to what part of the state, or to what railroad station in the state, the same

were consigned, or by what line of railroad the same were to be forwarded. It appears to this court, therefore, upon the pleadings that no cause of action for negligence is stated against the company, but that, if there was negligence on the part of any one, it was upon the part of the plaintiff in not having marked the goods with the name of the county, or otherwise with that of the railway station, or with the line of road by which they were to be sent.

The demurrer to the answer should, therefore, have been overruled; and the order sustaining it must be reversed, and the cause remanded for further proceedings, according to law.[17]

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## HART v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, 1886. 69 Iowa, 485, 29 N. W. 597.)

The plaintiff shipped a car load of property over defendant's railroad. It was destroyed in transit by fire, and this action was brought to recover for its loss. The property consisted of horses, harnesses, grain, household furniture, and personal effects. The contract of carriage provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. Plaintiff placed a man in charge of the horses and he was permitted to ride in the car with them. At Bancroft, Iowa, it was discovered that the hay which was carried in the car to be fed to the horses was on fire. The man in charge of the horses was asleep. Before the fire could be put out, the horses were killed and the rest of the property destroyed. Verdict and judgment for plaintiff. Defendant appeals.

REED, J.[18] 1. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give

[17] Acc. Caledonian Ry. Co. v. Hunter (Scotland) 20 Sess. Ca. (2d Ser.) 1097 (1858). And see The Huntress, 2 Ware, 89, Fed. Cas. No. 6,914 (1840); So. Ex. Co. v. Kaufman, 12 Heisk. (Tenn.) 161 (1873); Knorr v. Phil., etc., R. Co. 2 Wkly. Notes Cas. (Pa.) 187 (1875); Lake Shore R. Co. v. Hodapp, 83 Pa. 22 (1877); Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451 (1876); Broadwood v. So. Ex. Co., 148 Ala. 17, 41 South. 769 (1906). Compare O'Rourke v. C., B. & Q. R. Co., 44 Iowa, 526 (1876); Downing v. Outerbridge, 79 Fed. 931, 25 C. C. A. 244 (1897); Gulf, etc., Ry. Co. v. Maetze, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 635 (1885).

[18] The statement of facts has been rewritten. Part of the opinion is omitted.

this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant, who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. Coggs v. Bernard, 2 Ld. Raym. 909 [ante, p. 317]; Forward v. Pittard, 1 Durn. & E. 27 [ante, p. 318]; Riley v. Horne, 5 Bing. 217; Thomas v. Railway Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Roberts v. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311 [ante, p. 21]; Moses v. Railway Co., 24 N. H. 71, 55 Am. Dec. 222 [post, p. 505]; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also.[19] If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and

[19] Acc. Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507 (1876). In Ames v. Fargo, 114 App. Div. 666, 99 N. Y. Supp. 994 (1906), a mare was injured because the shipper's agent, who tied her in the car, left too much slack in the rope, against the objection of the carrier's employé. It was held that the common carrier was not liable for the injury.

care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr. § 216, and cases cited in the note; also Lawson, Carr. §§ 19, 23. * * *

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## AMERICAN EXPRESS CO. v. PERKINS.

(Supreme Court of Illinois, 1867. 42 Ill. 458.)

LAWRENCE, J.[20] This was an action on the case, brought by Mary E. Perkins against the American Express Company as a common carrier. There was a trial by the court and judgment for the plaintiff. The plaintiff below delivered to the company a package, containing a wreath, to be taken from Decatur to Cairo. The wreath was partially made of glass, and when it arrived at Cairo the glass was broken. The receipt given by the company to the plaintiff, and put in evidence by the latter, contained a provision that the company would not be responsible "for any articles contained in or consisting of glass." Without holding that the company could discharge itself, by this proviso, from its liability as a common carrier, unless the plaintiff assented to such proviso, we must, nevertheless, hold that such liability, to its common-law extent, did not attach, unless the company was informed what the package contained, in order that a degree of care might be used proportioned to its fragile character. The plainest dictates of fair dealing and good faith required the plaintiff to furnish this information.

This principle was settled in the case of Chicago & Aurora R. R. Co. v. Thompson, 19 Ill. 578, where it was sought to charge a common carrier for the loss of money in a valise that had been shipped in a box containing other articles of little value. The company was not informed that the box contained money, and its appearance furnished no indication of that fact, but rather the contrary. The court reviews the authorities, and holds that, in order to charge common carriers as insurers, they must be treated in good faith, and that concealment, artifice, or suppression of the truth will relieve them of this liability. It was held the company should have been informed of the money being in the box, in order to charge them. So, in this case, the company should have been told of the contents of this box before they can be charged for the breakage of so fragile a substance as glass. That they were so informed there is not a particle of evidence.

The judgment is reversed and the cause remanded. Judgment reversed.

[20] The statement of facts is omitted.

## ROSS v. TROY & B. R. CO.

(Supreme Court of Vermont, Rutland, 1877. 49 Vt. 364.)

Case for negligence in carrying machinery, whereby it was injured. Plea, the general issue, and trial by jury, September term, 1876; Wheeler, J., presiding.

Plaintiff's evidence tended to show that his workmen, on May 18, 1874, by his direction, loaded on a platform car, that had been furnished him at his shop in Rutland by the Delaware & Hudson Canal Company, certain machinery, consisting, among other things, of a piece of shafting with a flywheel and pulley at one end and a crank and crankwheel at the other, consigned to Strother & Sons of Philadelphia, to be transported by said company to Eagle Bridge, and thence by defendant over its railroad to Troy, whence it was to go by water to Philadelphia; * * * that the machinery was fastened on the car by blocks made of slabs 15 to 18 inches long, split through the middle, and placed as blocking under the flywheel and crankwheel, the thick part being next to the wheels, and nailed to the floor of the car with twenty-penny nails, and was apparently sufficiently fastened. * * *

The defendant's testimony tended to prove that the car on which the machinery was loaded was duly received by defendant and taken to Troy; that after its arrival it was put into a train, and the train carefully backed down towards the docks at a rate of speed not exceeding 3 miles an hour; that while the train was rounding a curve, the outer wheels of the car on which the machinery was rose and tipped, so that the fastenings under the lower side of the flywheel gave way, and the shaft and wheels rolled over and against the abutment of a bridge on the lower side of the car, and finally fell to the ground and were thereby injured; that the engineer and fireman were looking at the wheel as it began to roll; that the engineer instantly reversed the engine, and the fireman applied the brakes, stopping the train within the length of a car, and as soon as possible; that the track was well constructed and in good condition, and that the accident happened without any fault on the part of defendant, its agents or servants, in running the train. * * *

Defendant's evidence further tended to show that the injury happened wholly from the unskillful manner in which the nails were driven into the block under the west and lower side of the flywheel.

Among other witnesses who testified as to the cause of the accident was Philip H. Hicks, defendant's yardmaster at Troy, part of whose business it was to receive and forward freight cars, and to see that they were in good condition and properly loaded, and who, on cross-examination, testified that he noticed, after the car came into the yard at Troy, that the blocking of the machinery was shaky; that it was not very securely blocked for such big machinery; the wheels being

so high and so slight blocking under them, that he wondered it had come so far in that condition, and spoke to their men about it, and that he should not have sent it along if he had used his better judgment; but that the blocking under the large wheel that finally gave way and caused the injury was in its place, and did not appear to have been stirred at all, and that the only defect in it was that it was insufficient in the first place. * * *

The court held * * * that as the defendant's yardmaster at Troy, and the conductor of the train carrying the machinery, observed the machinery and its condition before it was sent along to be delivered to the next carrier, it was the duty of them, or some other of the agents or servants of the defendant, if anything was necessary to be done to make the machinery secure for transportation to the next carrier, to do it, and that as nothing was done, and the machinery was injured while being transported by defendant, defendant was liable, if the machinery was the property of the plaintiff.[21] * * *

BARRETT, J. The county court seem to have regarded the facts stated by Hicks on cross-examination as decisively fixing liability on the defendant for the injury to the property. That Hicks saw the articles as they had been fixed and fastened by the plaintiff, and thought the fastenings inadequate, seems to have been regarded as the vital fact working that result. The fastening, whose insufficiency caused the injury, had not been changed in any respect when Hicks saw it, nor when the accident happened. Had that fastening been sufficient, the accident would not have happened. Is the defendant chargeable with the consequences of that insufficiency? We think not, in the sense in which the County Court seems to have regarded it. The undertaking and duty of the defendant was, to transport and deliver safely against all contingencies except the act of God, public enemies, and acts of the parties shipping the property. It was the insurer against everything but those. But as against them, it was bound only to the exercise of reasonable care and diligence.

In this case, it undertook to transport the articles safely, in the condition in which the plaintiff had packed them, insuring against everything but that condition and its consequences, and bound to use reasonable care and diligence against injury resulting from that condition. The car was procured by the plaintiff of another railroad company, it was taken and loaded by the plaintiff in his own way, and as loaded, came to defendant from another road, and was taken by the defendant in the line of transportation to Troy, in the condition in which the plaintiff had loaded and prepared it for transportation. The plaintiff did not ask nor expect anything more to be done by the railroads in that respect. It stands for consideration the same as if the plaintiff had put the articles into boxes, and had loaded them in his own way. He would have the risk of the sufficiency of the packing.

[21] The statement of facts has been abbreviated.

If damage should occur by reason of insufficiency in that packing, the carrier would not be liable for it. If on the journey the boxes should get broken and the packing loosened and insecure, it would become the duty of the carrier to exercise reasonable and proper care to secure the articles against injury on that account. But supposing the boxes to have remained whole, and it should not appear that the contents had got loose, it would be difficult to assign a reason why the carrier should be chargeable for injury resulting solely from their having got loose, or from the boxes not proving strong enough to hold them.

In the case before us, the testimony is that the blocking under the large wheel that finally gave way and caused the injury, was in its place, and did not appear to have been started or stirred at all, and the only defect in it was that it was insufficient in the first place.

It seems incongruous for the plaintiff to claim that the defendant should overjudge him in a matter in which he assumed to judge and to do all that he required or supposed necessary to be done in the premises, and that the defendant should be responsible for the inadequacy of what the plaintiff adjudged and did. If things continued to be just as the plaintiff had fixed them, and nothing occurred in the transportation, against which the defendant was bound to exercise precautions beyond what the plaintiff had done, there would seem to be no ground for holding the defendant liable for the plaintiff's shortcoming.

We think the cause should have been submitted to the jury upon views conformable to what is above expressed, for them to find from the evidence whether the injury was caused by the failure of the defendant to exercise reasonable and proper care in respect to the fastenings and the transportation of the articles in question. The other question, viz., as to the right of the plaintiff to bring this suit, we think, upon the evidence, is with the plaintiff.

Judgment reversed, and cause remanded.[22]

[22] See, also, Miltimore v. Chicago, etc., R. Co., 37 Wis. 190 (1875); The David and Caroline, 5 Blatchf. 266, Fed. Cas. No. 3,593 (1865).

In Union Express Co. v. Graham, 26 Ohio St. 595 (1875), a fragile foot rest of carved wood wrapped in paper tied with a cord was delivered to a carrier, who accepted it only at owner's risk, on the ground that it was improperly packed; such articles being usually boxed or crated. The court said: "The carrier may well refuse to receive the property unless it is properly packed; but if he receives it the duty attaches of exercising due care for its safe carriage. If, notwithstanding such care, the property should be damaged through the defective packing of the owner the carrier would be relieved from liability."

In Klauber v. American Express Co., 21 Wis. 21, 91 Am. Dec. 452 (1866), goods were shipped without covering sufficient to protect them from rain, and were damaged by rain while in the carrier's hands. The carrier was held liable.

In Stuart v. Crawley, 2 Starkie, 323 (1818), a greyhound was delivered to a carrier with a string about his neck. The carrier tied him by this string. The dog slipped his head through the noose and escaped. Lord Ellenborough told the jury that the carrier was liable. He said: "The case was not like that of a delivery of goods imperfectly packed, since there the defect was not

## SECTION 5.—DELAY.

### CONGER v. HUDSON RIVER R. CO.

(Superior Court of City of New York, 1857. 6 Duer, 375.)

Motion on the part of the plaintiffs, for judgment on a verdict in their favor; the questions of law arising on the trial having been directed to be heard, in the first instance, at the General Term.

The action was brought to recover damages from the defendants, as common carriers, for their delay in the transportation, upon their railroad, of cattle belonging to the plaintiffs, from Albany to New York. The cattle were received at Albany in the afternoon of the 29th of March, 1854, and would, according to the usual and ordinary course of transportation on the defendants' road, have arrived in New York early on the following morning (Thursday), that being what

visible; but in this the defendant had the means of seeing that the dog was insufficiently secured. * * * The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for its security."

Compare Evans v. Fitchburg R. Co., note 3, ante, p. 358.

In The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059 (1867), a passenger, on leaving the ship at quarantine in company with the captain, his trunk remaining on board, was asked by the captain if the trunk contained money, and answered that it contained only clothing. In fact it contained, beside clothing, $60 in coin, a gold watch, and gold ornaments. The trunk was afterwards missing. It was held that the passenger could not recover even for the trunk and clothing.

ACT OF SHIPPER CONCURRING WITH DEFAULT OF CARRIER.—McCarthy v. Louisville & Nashville R. Co., 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29 (1893), was an action in ordinary form arising from the breakage of goods in transit. The evidence indicated that the goods had been insufficiently packed by the shipper, but did not affirmatively establish that the carrier had transported them with due care. McClellan, J., said: "The defenses which a carrier under such a contract may interpose to an action for failure to deliver in good condition are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy. But there is in reality a third, resting on the fault of the owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of *contributory negligence*, available in actions against common carriers of passengers, sometimes in actions against carriers of live stock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment which limit liability to loss or injury occasioned by the carrier's negligence. * * * In these latter cases the contributory negligence of the plaintiff neutralizes and renders innocuous the causal negligence of the defendant, and destroys a cause of action resting upon it. But in the other class of cases, that to which the case at bar belongs, negligence upon either hand is regarded from an entirely different standpoint, and accorded an entirely different effect and operation, so to speak, on the rights of the parties. The unaided, uncontributed to negligence of the plaintiff producing the injury is a defense; but where there is negligence also on the part of the defendant, without which,

the witnesses call market day; but, by reason of delay, they did not arrive until the evening of that day. From the length of the time consumed in the transportation, the cattle, which were inclosed in cars, became weary; some lay down, and were trampled upon by others, and on their delivery in New York were found bruised and shrunken, and deteriorated in respect to their condition for market. They were sold by the plaintiffs on the following Monday, the next regular market day, but between Thursday and Monday the price of cattle in the market fell $1.50 per cwt.

The plaintiffs claimed to recover for the damages sustained from the injuries to and the shrinkage of the cattle, and also damages for the loss of the market on Thursday.

The defendants sought to excuse the delay by showing that it happened without their fault.

The judge charged that common carriers are responsible for damages to personal property, whilst in their care, which may be ultimately delivered, whether such injury was occasioned by the carelessness or negligence of the carriers or not; that in this case the delay which caused the damage arose out of a collision between a train of

notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense. In the one case, plaintiff's contributory negligence destroys the cause of action; in the other, defendant's concurring negligence destroys the defense."

Where the shipper assumes part of the work, it is, in general, no part of the carrier's duty to inquire whether he has done his work properly, and damage caused by the shipper's failure is not attributed to the carrier's default, merely by reason of the fact that the carrier might easily have discovered it and obviated its consequences. Miltimore v. Chicago & R. Co., 37 Wis. 190 (1875); Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507 (1876); Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961 (1892); Pa. Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215 (1898); Cohn v. Platt, 48 Misc. Rep. 378, 95 N. Y. Supp. 535 (1905); Chicago, I. & L. R. Co. v. Reyman (Ind.) 73 N. E. 587 (1905). And see Brind v. Dale, 8 C. & P. 207 (1837).

In the following cases, where an act of the shipper concurred with an act or default of the carrier in producing loss, the carrier was excused: Shipping goods with knowledge of defect in carrier's equipment, without notifying carrier of defect. Betts v. Farmers' L. & T. Co., 21 Wis. 81, 91 Am. Dec. 460 (1866); St. Louis, I. M. & S. Ry. Co. v. Law, 68 Ark. 218, 57 S. W. 258 (1900). Requesting carrier to do negligent thing. Jackson Arch. Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899); Texas Central R. Co. v. O'Laughlin (Tex. Civ. App.) 72 S. W. 610 (1903). Overcrowding live stock where railroad has failed to furnish sufficient cars. Texas & Pac. Ry. Co. v. Klepper (Tex. Civ. App.) 24 S. W. 567 (1893); Ficklin v. Wabash R. Co., 115 Mo. App. 633, 92 S. W. 347 (1906).

But in the following cases goods were shipped with knowledge that the carrier's cars were dangerous or insufficient, and the carrier was held liable for resulting loss; it being considered, perhaps, that the shipper acted prudently in shipping rather than delaying for better accommodation. Railroad Company v. Pratt, 22 Wall. 123, 22 L. Ed. 827 (1874); Johnson v. Toledo, etc., Ry. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 464 (1903); St. Louis, I. M. & S. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802 (1905). And see So. Ry. Co. v. Wood, 114 Ga. 159, 39 S. E. 922 (1901), where a passenger recovered for sickness caused by the uncleanly and offensive condition of the car.

the defendants and a train of the Hudson & Berkshire Railroad Company; and that the defendants were responsible for the damages sustained, although that collision was caused by the negligence of the Hudson & Berkshire Road alone.

To these portions of the charge the defendants excepted.

WOODRUFF, J.[28] The undertaking and duty of a common carrier, on receiving goods for carriage, is twofold: First, to carry and deliver safely; second, so to carry and deliver within a reasonable time.

The first duty is absolute. Nothing but the act of God or the public enemies will relieve the carrier from its performance.

The second duty is relative, depending upon various circumstances and conditions under which goods are received, the means at the command of the carrier, and the absence of fault on his part in the provision he has made for the performance of his duty.

What is a reasonable time must always be determined by the circumstances under which the carrier acts, and not by the inquiry what under other circumstances would be reasonable, nor even by the inquiry what period is ordinarily required for the performance of the service.

The distinction above stated is to be found in the elementary writers treating of the law of common carriers, and is, I apprehend, too well settled to be now open for discussion; and its recognition in this state unequivocally appears in Parsons v. Hardy, 14 Wend. 217, 28 Am. Dec. 521; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Wibert v. New York & Erie Railroad Co., 12 N. Y. 245; Id., 19 Barb. 36.

The delay in the present case is alleged by the defendants to have arisen from the negligent act of another railroad company without fault on their part, by which their cars were thrown from the railroad track, and the passage of the following train (containing the plaintiffs' property) necessarily hindered.

The case of Parsons v. Hardy presented the precise question whether such an accident caused by the act of third parties, through their misadventure or negligence, excused the delay. The court held "that evidence that the delay was so caused was admissible," and that if the fact were proved, and the accident shown to have occurred without any want of diligence, care and skill on the part of the carrier, it would excuse the delay. * * *

How the jury would have found, had the question whether the delay, and the consequent injury to the plaintiffs' cattle, were without the fault or negligence of the defendants or their servants, been submitted to them, we are not able to say. If we could determine what is the weight of the evidence upon that subject, we should not consider ourselves at liberty to do so. But if the jury had found in the de-

[28] The statement of facts has been abbreviated, and parts of the opinion omitted.

fendants' favor upon that question, then the delay was caused by what was, as to the defendants, an inevitable accident, which, according to the cases mentioned, would excuse them.

If, then, the defendants are not responsible for the delay in the delivery, that being excused, the excuse must necessarily relieve them from liability for any injury to the property which is the mere result of the delay; that is, in the case before us, the injury described by the witness as the shrinkage, fatigue, and trampling of the cattle upon each other, by reason of the increased time consumed in the carriage.

So far as this was the mere result of delay, it must stand upon the same footing as the depreciation or deterioration of property, in the course of transportation, from its own inherent character and liability to decay, or injury from mere lapse of time, or from the act of carriage itself. No rule of responsibility imposes upon the carrier losses arising from the ordinary deterioration of goods in quantity or quality, in the course of transportation, or from their inherent infirmity or tendency to decay.

We are not able to perceive any reason upon which the shrinkage of the plaintiffs' cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods.

The rule undoubtedly requires of the carrier that he use all reasonable and proper care that the delay may not be unnecessarily prejudicial.

And under the rule above stated, if the delay was without the fault of the defendants, it is entirely clear that the damages, which consisted (as alleged) in the loss of the market, cannot be recovered. The claim has no foundation whatever, save in the mere lapse of time, and if that be excused the claim is obviously groundless. * * *

A new trial must be ordered, with costs to abide the event.[24]

[24] Acc. Indianapolis & St. Louis R. Co. v. Juntgen, 10 Ill. App. 295 (1882); Lake Shore & M. S. Ry. Co. v. Bennett, 89 Ind. 457 (1883); Little v. Fargo, 43 Hun, 233 (1887); Int. & Gt. N. R. Co. v. Hynes, 8 Tex. Civ. App. 20, 21 S. W. 622 (1893).

In Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45 (1890), an action for delay in transporting a car load of lemons, the answer averred that "rioters uncoupled the cars, and forced said car of fruit upon a side track, where, by overwhelming force and arms and violence, for the space of, to wit, five days, they held possession of the same, refusing to permit the defendant to remove the same." Stayton, C. J., said: "To the extent the fruit may have deteriorated, on account of its perishable nature while in transit, the facts pleaded would furnish a defense, if defendant bestowed upon it proper care, for in such case such a loss would be attributed solely to the delay which the answer excuses."

## PITTSBURGH, FT. W. & C. R. CO. v. HAZEN.

(Supreme Court of Illinois, 1876. 84 Ill. 36, 25 Am. Rep. 422.)

DICKEY, J. On the 10th of December, 1870, Hazen shipped, by the freight line of the railway company, a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees, at New York, on the 28th of December—18 days after the shipment. The proofs tended to show that the usual period of such transit, at that time, did not exceed 12 days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th; and that the cheese, when delivered in New York, was frozen, and thereby damaged to the amount of $1,100.55, and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeals.

As an excuse for this delay beyond the usual period of such transit, the defendant, at the trial below, sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Leavitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who, up to that time, had been employed by the railway company; that the brakemen refused to work, and were discharged, and other brakemen promptly employed, but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court.

This, we think, was error. It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases from the misconduct of their employés, whether such misconduct be willful or merely negligent. If employés of a common carrier suddenly refuse to work, and the carrier cannot promptly supply their places with other employés, and injury results from the delay, the carrier is responsible. Such delay results from the fault of the employés. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employés to conduct the trains, for the places of the "strikers" were, according to the proof offered, promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employés of the company. The case supposed is not distinguishable in principle from the assault of a mob of strangers.

All the testimony on this subject should have been submitted to the jury, for their determination of the question whether, under all the circumstances, the period of transit was unnecessarily long.

For the delay resulting from the refusal of the employés of the company to do duty, the company is undoubtedly responsible. For de-

lay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company.

Where employés suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employés in refusing to do their duty, and this misconduct in such case is justly considered the proximate cause of the delay;[25] but when the places of the recusant employés are promptly supplied by other competent men, and the "strikers" then prevent the new employés from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employés, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

The judgment is therefore reversed, and the cause remanded for a new trial.

Judgment reversed.[26]

WALKER, CRAIG, and SCHOLFIELD, JJ. We dissent from the reasoning and conclusion in the foregoing opinion.

## SECTION 6.—GRATUITOUS CARRIAGE

Lord COKE, in his report of SOUTHCOTE'S CASE, Court of King's Bench, 4 Co. 83b 1601: * * * But in accompt it is a good plea before the auditors for the factor that he was robbed, as appears by the books in 12 (22) E. 3. Accompt 111. 41 E. 3, 3 and 9 E. 4, 40. For if a factor (although he has wages and salary) does all that which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandize the best that he can, and a servant is bound to perform the command of his master; but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves. Vide 22 Ass. 41.

[25] Acc. Blackstock v. N. Y. & E. R. Co., 20 N. Y. 48, 75 Am. Dec. 372 (1859); Read v. St. Louis, etc., R. Co., 60 Mo, 199 (1875).

[26] Acc. Pittsburg, etc., R. Co. v. Hallowell, 65 Ind. 188, 32 Am. Rep. 63 (1879); Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457 (1883); Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am Rep. 837 (1886); International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545 (1889).

1 ROLLE'S ABRIDGMENT, 2 c, pl. 4: If one delivers goods to a common carrier to carry, and the carrier is robbed of them, yet he shall be charged with them because he had hire for them, and has implicitly taken upon himself the safe delivery of the goods and therefore he shall answer for their value if he be robbed (citing Woodlife's Case, ante, p. 312).

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## KNOX v. RIVES.

(Supreme Court of Alabama, 1848. 14 Ala. 249, 48 Am. Dec. 97.)

CHILTON, J.[27] The defendants are sued as common carriers, to recover the value of a sealed package, containing $2,500 in bank bills, received on board the steamboat Montgomery, by the clerk thereof, to be carried from the city of Mobile to the city of Montgomery, and to be delivered to the plaintiff. The package was lost.

The plaintiff having proved that the boat was engaged in carrying goods and merchandise generally for hire, and the general custom of boats engaged in similar business as the Montgomery, in carrying letters containing remittances of bank bills, we think it was permissible for the defendants to explain that usage, by showing that no freight or compensation was ever charged, or allowed, upon such remittances, unless some evidence was given by the boat of their receipt, in which event only a charge was made, and, further, to show that such was the uniform practice of defendants' boat. If we allow the usage to be irrelevant, the proof of it was first introduced by the plaintiff, and in such case rebutting proof is allowed. * * *

We come now to the main question presented by the record, which is whether the defendants are liable as common carriers for the package received on board their boat, to be transported, without reward, from Mobile to Montgomery; for we must regard the finding of the jury as affirming that the boat undertook to carry such package gratuitously.

To my mind, it is a clear proposition of law that the payment of freight on the part of the shipper, or the right of the carrier to sue for and recover the same, lies at the foundation of the defendants' liability as common carriers. Lord Coke says: "He hath his hire, and thereby implicitly undertaketh the safe delivery of goods delivered to him." Co. Lit. 89, a. A common carrier, says Judge Story, has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place. Com. on Bail. 321, § 495.

In the case of Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16–35, Fed. Cas. No. 2,730, the same learned judge holds this lan-

[27] The statement of facts and parts of the opinion are omitted.

guage: "I take it to be exceedingly clear that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any compensation for his services. If no hire or recompense is payable ex debito justitiæ, but something is bestowed as a gratuity or voluntary gift, then, although the party may transport persons or property, he is not a common carrier, but a mere mandatory."

It is admitted that no contract to pay freight is necessary, neither is it necessary that the rate of compensation to be paid should be fixed, but the right to compensation must exist. If it does not exist, the defendants are mandatories, not common carriers. To hold that the law would devolve upon the defendants, with respect to such gratuitous accommodation, the liability of insurers, it seems to me would be repugnant to the dictates of justice. Partridge v. Brewster, 1 Pick. (Mass.) 50; Story, Bail. §§ 495, 505; Gisbourn v. Hurst, 1 Salk. 249; Allen v. Sewall, 2 Wend. (N. Y.) 327, s. c. 6 Wend. 335. * * *

The fact that the usage may have originated in a belief on the part of the owners of boats that their custom and consequent receipts would be enhanced by the gratuitous transportation of such packages does not, in our opinion, vary their liability. The proof shows such letters were received indiscriminately, and indifferently from all persons, as well from those who were patrons of the boat as from those who were not. Such consideration would be too vague, indefinite and remote, to form the basis of such extraordinary liability.

In our opinion, there is no error in the record, and the judgment of the circuit court is affirmed.

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NORTON, J., in LEMON v. CHANSLOR, 68 Mo. 340, 30 Am. Rep. 799 (1878): "* * * The weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if 'a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.' Shiells v. Blackburne, 1 H. Bl. R. 115, 158; Shillibeer v. Glyn, 2 Mees. & W. 143. In the case of Philadelphia & Read. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502, it was * * * observed that, 'when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy requires that they should be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such cases may well deserve the epithet of gross.' * * * If the above authorities go no further,

they at least conclusively settle the question that a gratuitous passenger can recover for an injury occasioned by the gross neglect of the carrier, and also that in such cases any negligence is gross negligence." [28]

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## PIERCE v. MILWAUKEE & ST. P. RY. CO.

(Supreme Court of Wisconsin, 1868. 23 Wis. 387.)

Action to recover the value of eight bundles of bags, which had been in use for two seasons in transporting grain from Lake City, Minn., to Genoa, Wis., by way of the river and the defendant's railway. The complaint alleged that the bags were delivered by the packet company doing business on the river, to the defendant at La Crosse, and that defendant, as a common carrier, received said bags to be safely carried by it over its railway, and delivered at Milwaukee to the plaintiff, "for a reasonable compensation to be paid by the plaintiff therefor." Answer, a general denial. At the trial defendant sought to avoid liability, as a common carrier, for the loss of the bags, by showing a uniform and long-established custom of the river and railway, that all bags used in the transportation of grain on said river or railway were carried free of charge, when empty, claiming that for bags so carried it could be held responsible only in case of gross negligence. * * *

Verdict and judgment for the plaintiff, and defendant appealed.

PAINE, J.[29] After carefully considering the original briefs of counsel and the arguments upon the rehearing, I have come to the conclusion that the carrying of the bags of the plaintiff by the company cannot be considered as gratuitous, whether the custom was only to return bags free that had gone over the road filled, or whether it was a general custom to carry the bags of customers free both ways, without regard to the question whether, at any particular time, they were returning from a trip on which they had passed over the road filled, or not. If such a relation were created by an express contract, instead of being based upon a custom, it would seem clear that there would be a sufficient consideration for the agreement to carry the bags. If a written contract should be signed by the parties, in which the one should agree to give the company the transportation of his grain at its usual rates, and the company should agree in considera-

[28] See, also, Ohio & M. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336 (1861); Gulf, etc., Ry. Co. v. McGown, 65 Tex. 640 (1886); Indianapolis, etc., Co. v. Lawson, 143 Fed. 834, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721 (1906).

"Nor is it material that the gratuitous carriage of a trunk was accompanied by the gratuitous carriage of a person. The duty to carry the trunk safely was only the same that the law would have imposed had the trunk been taken upon a freight train gratuitously: and no greater degree of care could be demanded in one case than in the other." Cooley, C. J., in Flint & Pere Marquette Ry. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499 (1877).

[29] Parts of the statement of facts and of the opinion are omitted.

tion thereof to carry the grain at those rates, and also to carry the bags both ways whenever the customer might desire it, without any further charge, there can be no doubt that the giving to the company his business, and the payment of the regular freight, would be held to constitute the consideration for this part of the agreement on the part of the company.

But if it would be so in such a case, it is equally so when the same understanding is arrived at through the means of a custom. The company, by establishing such a custom, makes the proposition to all persons, that if they will become its customers, it will carry their bags both ways without any other compensation than the freight upon the grain. Persons who become its customers in view of such a custom do so with that understanding. And the patronage and the freights paid are the consideration for carrying the bags. The company, in making such a proposition, must consider that this additional privilege constitutes an inducement to shippers to give it their freight. And it must expect to derive a sufficient advantage from an increase of business occasioned by such inducement, to compensate it for such transportation of the bags. And it ought not to be allowed, when parties have become its customers with such an understanding, after losing their bags, to shelter itself under the pretext that the carrying of the bags was a mere gratuity, and it is therefore liable only for gross negligence.

It makes no difference that the custom is described as being to carry the bags free. In determining whether they are really carried "free" or not, the whole transaction between the parties must be considered. And when this is done, it is found that all that is meant by saying that the empty bags are carried free, is, that the customers pay no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous. * * *

I can see no ground for any such difficulty as that suggested by the appellant's counsel on the re-argument. He said, if this undertaking to return bags free was to be considered a matter of contract on the part of the company, it would be unable to collect its freights on delivering grain upon the ground that its contract was not then completed. But this could not be so. The company, on delivering the grain, parts with the possession of the property to the shipper or his consignee. And on doing that, it is of course entitled to its freight. And its agreement to return the bags without further charge, or to carry them free both ways whenever its customer should deliver them empty for that purpose, could not have the effect of destroying this right. The contract would be construed according to the intention of the parties. See Angell on Carriers, § 399, note 3, and cases cited. And here it would be very obvious that neither of the parties contemplated any relinquishment by the company of its right to freight on delivering the grain. The transaction for that purpose would be

distinct. Here the defendant's evidence showed that the plaintiff was a "customer." The company claims that he had complied with the custom on his part, so as to make it applicable to him. But if he had done so, as that constitutes a sufficient consideration to prevent the carrying of his bags from being gratuitous, the company is liable.

It is immaterial, therefore, whether the instruction excepted to was strictly accurate or not, in assuming that there was evidence tending to show that the bags were on a return trip, after having gone over the road filled; as neither in that case, nor on the custom as claimed to have been shown by the appellant, would the transportation be gratuitous.

The judgment is affirmed, with costs.[80]

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## SECTION 7.—ARTICLES NOT IN THE CARRIER'S CUSTODY

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### LOVETT v. HOBBS.

(Court of King's Bench, 1680. 2 Show. 127.)

Case. The plaintiff declares, for that Richard Hobbs, on the first day of November, in the thirty-first year of Charles the Second, and

[80] In the following cases carriage nominally free was held to be for hire: Proceeds of goods sold brought back in pursuance of usage to do so without extra charge. Kemp v. Coughtry, 11 Johns. (N. Y.) 107 (1814); Harrington v. McShane, ante, p. 39. Drover's "free pass" issued as part of contract to carry cattle. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627 (1873); Lake Shore & M. S. Ry. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425 (1906); cases in 9 Cent Dig. Carriers, § 980. Employé's trunk, if carried under usage to make no charge to employés. Gott v. Dinsmore, 111 Mass. 45 (1872). Tank cars, though freight charged only on oil they contained. Spears v. Lake Shore, etc., R. Co., 67 Barb. (N. Y.) 513 (1876). Woman traveling on "free pass" issued at her husband's request that she might accompany him on his journey to testify for the railroad, if given in consideration of his making the journey. Nickles v. Seaboard Air Line, 74 S. C. 102, 54 S. E. 255 (1906), semble.

"The defendant desired plaintiff's services at Glenn's Ferry, and agreed to transport him there free of charge, if he would go there and enter its employment after he arrived there. The plaintiff agreed to this arrangement. The transaction was a mutual benefit to both of the parties, and the pass did not alter it. This was a case where the defendant as a common carrier of passengers could not stipulate for the exemption from liability on account of the negligence of his servants." Williams v. Oregon Short Line R. Co., 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777 (1898). And see Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535 (1877).

Compare Ulrich v. N. Y. Cent. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369 (1888), passenger traveling on free pass who paid for seat in parlor car. In Gray v. Mo. River Packet Co., 64 Mo. 47 (1876), a common carrier who had accepted an animal for transportation, saying that he would not charge much, if anything, and intending to charge nothing, was held to be a carrier for hire.

long before and after, was, and yet is a common hackney coachman, and a common carrier as well of men's persons as of their goods and chattels, in his coach from the borough of Marlborough to the city of London; and thence to Marlborough, pro mercede et stipendio, to be paid for persons and their goods; and also that all common coachmen and common carriers by the law and custom of England ought safely and securely to keep all passengers' goods and chattels from loss; and whereas the plaintiff the day and year aforesaid, at Marlborough aforesaid, had delivered to the defendant one box, in which were several goods and chattels of the plaintiffs, viz., etc., to be carried from Marlborough to the city of London, and safely to be delivered to the plaintiff there; and the plaintiff in fact says, that the defendant afterwards, viz. 1st November aforesaid, took his journey towards London, and the 2d of November performed his journey and came to London, and yet notwithstanding, the defendant being negligent of his office of a common coachman and common carrier, did not safely and securely carry the said box and goods, and deliver them to the plaintiff; whereby the plaintiff lost her said goods, to the value of sixty pounds; and lays it to her damage of one hundred pounds.

Upon not guilty pleaded it came to Salisbury assizes, before the then Mr. Justice JONES, where, upon evidence, the case appeared, that the plaintiff was a passenger in the defendant's coach, which was a stagecoach between London and Marlborough, and the goods carried with her.

Upon which I, being of counsel with the defendant, urged, that the action lay not, for that a common coachman is but a new invention and not within the common law or custom of England concerning common carriers; that this is not for conveyance of goods, but of persons; and whatsoever goods of passengers are by them carried are still in the passengers' custody, and they remove them to their own chambers at nights in their inns; and if this should hold, where would it end; it might as well be brought for the rings on their fingers, or money in their pockets which highwaymen rob the passengers of.

But the judge was of opinion, that if a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's: the like of a waterman or Gravesend boat, which carries both men and goods.

Then we were forced to give evidence of our coach's being full; our refusal to carry them; and that, without our knowledge at first, the porter put up the box behind the coach, which, when we perceived, we denied to take the charge of it.

The Judge agreed this to be a good answer; for if an hostler re-

fuse a guest, his house being full, and yet the party say he will shift, etc., if he be robbed, the hostler is discharged.

This fact being left to the jury, there was a verdict for the defendant. * * *

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## WYCKOFF v. QUEENS COUNTY FERRY CO.

(Court of Appeals of New York, 1873. 52 N. Y. 32, 11 Am. Rep. 650.)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for the loss of plaintiff's horse, wagon and harness, alleged to have been occasioned by the neglect of defendant while the property was upon its boat, in the custody and care of plaintiff.

On the 5th October, 1866, plaintiff drove his horse and buggy on board the defendant's ferryboat at Astoria to cross over to New York. He and his wife remained in the buggy. When the whistle was blown for the boat to leave, the horse became restive; and upon the blowing of the second whistle rushed forward, and the whole establishment, with plaintiff and wife, were precipitated into the river, and the horse and buggy were lost. Evidence was given tending to show that the chain or barrier at the outer end of the boat was either not up or was entirely insufficient.

ALLEN, J.[21] A ferryman is not a common carrier of property retained by a passenger in his own custody and under his own control, and liable as such for all losses and injuries except those caused by the act of God or the public enemies. The cases which go the length of holding that the ferryman is chargeable as a common carrier for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the boat, may be regarded as agent of the ferryman, do not stand upon any just principle, and are not within the reasons of public policy upon which the extreme liability of common carriers rests. Among the cases to this effect are Fisher v. Clisbee, 12 Ill. 344;[22] Powell v. Mills, 37

[21] Parts of the opinion have been omitted.

[22] In Fisher v. Clisbee, 12 Ill. 344 (1851), supra, Caton, J., said: "It is true that travelers usually have a care, and to a certain extent take charge of their own teams and property while on the ferryboat, but this is in subordination to the ferryman himself. If they do not manage or dispose of them as he thinks best, he may take them entirely out of their hands and arrange them according to the dictates of his own judgment, for he is responsible for their safety. It is true, if the owner, by his willful and perverse conduct, occasions a loss which would not otherwise have happened, then he cannot charge the ferryman with a loss for which he alone is responsible. But while acting in good faith, and not in violation of the ferryman's commands, the owner may be considered as his servant so far as he does manage

Miss. 691; and Wilson v. Hamilton, 4 Ohio St. 722. These suggestions are made necessary by the fact that the Supreme Court at General Term based their judgment upon the doctrine of the cases referred to, and to which we are not prepared to assent.

The trial at the circuit, and the recovery there, was upon an entirely different principle, and one more in accordance with our view of the law. While ferrymen, by reason of the nature of the franchise they exercise, and the character of the services they render to the public, are held to extreme diligence and care and to a stringent liability for any neglect or omission of duty, they do not assume all the responsibility of common carriers. Property carried upon a ferryboat in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or the owner. Both have duties to perform in respect to it. If lost or damaged by the act or neglect of the ferryman he must respond to the owner. The ordinary rules governing in actions for negligence apply; and a plaintiff cannot recover if he is guilty of negligence on his part, contributing to the loss.

The liability of a common carrier, in all its extent, only attaches when there is an actual bailment, and the party sought to be charged has the exclusive custody and control of property for carriage. A ferryman does not undertake absolutely for the safety of goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boat, and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants. At the same time the owner of the property, retaining the custody of it, is bound to use ordinary care and diligence to prevent loss or injury. * * * The motion for a nonsuit was properly refused, and the question as to the alleged negligence on the part of the defendant, as well as to contributory negligence on the part of the plaintiff, submitted to the jury. * * *

Judgment affirmed.[88]

the property, after it has once got into the boat, and thus come into the possession of the boatman. * * * During the trial, evidence was given by the defendant, tending to show that Kuhn, who was driving the plaintiff's horse at the time, and who at the request of one of the ferrymen, was holding the horse by the head, was requested by those having charge of the boat, to unhitch the horse from the carriage, to which he made no reply, and did not do so. * * * Even if Kuhn had heard the direction, he was not bound to obey it. The horse and carriage were in the possession and control of the ferryman, and Kuhn was under no more legal obligation to unhitch the horse than he was to assist the propelling the boat. It was strictly the business of the ferrymen to do all that was needful for the safe transportation of the property intrusted to their care."

See, also, Evans v. Rudy, 34 Ark. 383 (1879); Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935 (1905); Atchison, etc., Ry. Co. v. Ditmars, 3 Kan. App. 459, 43 Pac. 833 (1896), drover accompanying cattle; Robinson v. Dunmore, 2 B. & B. 416 (1801), shipper's servant accompanying goods on lighter.

[88] See, also, White v. Winnisimmet Co., 7 Cush. (Mass.) 155 (1851).

STRONG, J., in BANK OF KENTUCKY v. ADAMS EXPRESS CO., 93 U. S. 174, 177, 184, 23 L. Ed. 872 (1876): "The defendants in each of these cases are an express company engaged in the business of carrying for hire money, goods, and parcels from one locality to another. In the transaction of their business they employ the railroads, steamboats and other public conveyances of the country. These conveyances are not owned by them, nor are they subject to their control, any more than they are to the control of other transporters or passengers. The packages entrusted to their care are at all times, while on these public conveyances, in the charge of one of their own messengers or agents. * * * It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being; and, if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. Miles v. Cattle, 6 Bing. 743; Tower v. Utica & Syracuse R. Co., 7 Hill (N. Y.) 47, 42 Am. Dec. 36; Redf. on Railw. § 74."

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## TOWER v. UTICA & S. R. CO.

**(Supreme Court of New York, 1844. 7 Hill, 47, 42 Am. Dec. 36.)**

Trespass on the case for the loss of a passenger's overcoat. The passenger had the overcoat on his arm when he entered the railroad car, and put it beside him on the seat. When he left the car at his destination he forgot his coat, and it was stolen. Nonsuit. Exceptions.

NELSON, C. J.[34] I am of opinion that the nonsuit was properly granted. The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers, Being an article of wearing apparel of present use, and in the care and keeping of the traveler himself for that purpose, the defendants have a right to say that it shall be regarded in the same light as if it had been upon his person. No carrier, however discreet and vigilant, would think of turning his attention to property of the passenger in the situation of the article in question, or imagine that any responsibil-

[34] The statement of facts has been rewritten, and part of the opinion omitted.

ity attached to him in respect to it. Even an innkeeper is not liable where the guest takes the goods to his room for the purpose of having the care of them himself. Burgess v. Clements, 4 Maule & Selw. 306; Jer. Law of Carr. 150, 156.

Again, all the books agree that if the negligence of the passenger conduces to the loss of the goods, the carrier is not responsible. Whalley v. Wray, 3 Esp. 74; Jer. Law of Carr. 55, 156. Now the loss in this case occurred through the gross neglect of the plaintiff. * * *

New trial denied.[35]

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## CLARK v. BURNS.

(Supreme Judicial Court of Massachusetts, 1875. 118 Mass. 275, 19 Am. Rep. 456.)

Contract for the value of a watch against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers. The case was submitted on a statement of facts, in which it was agreed that the plaintiff, a passenger on defendants' transatlantic steamer, hung his waistcoat on a hook in his stateroom one evening when he went to bed, leaving in the watch pocket a watch which he wore by day. Next morning the watch was missing. There was no means of fastening the stateroom door, and defendants' rules, as plaintiff had learned on previous voyages, forbade fastening the doors, in order that stewards might at all times

[35] In Weingart v. Pullman Co., 58 Misc. Rep. 187, 108 N. Y. Supp. 972 (1908), plaintiff, a passenger over the Pennsylvania Railroad, bought of defendant a ticket for a seat in a parlor car. The court said: "Just before entering the car he gave his overcoat to defendant's porter, and told the porter to put it on the seat plaintiff had engaged in defendant's said car. He followed the porter into the car, and saw him place the overcoat on the said seat. Plaintiff then went into another car, and remained about an hour and a half, when he returned to the seat in defendant's said car and found that his overcoat was gone. * * * Under these circumstances the mere unexplained disappearance of the coat did not establish defendant's liability; but it was incumbent on plaintiff to show negligence on the part of defendant."

Porter's

In Great Western Ry. Co. v. Bunch, 13 A. C. 31 (1888), Lord Watson, in speaking of the carriage of luggage by English railways, said: "* * * Eminent judges have differed as to the nature of the contract under which hand luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner; that is to say, with ordinary care, others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. * * * I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit to which the act or default of the passenger has been contributory." The defendant was accordingly held liable, irrespective of negligence, for the disappearance of a bag which a passenger gave a porter to put into his compartment in the carriage while he went to buy a ticket.

have access to the rooms. The trial court ruled that plaintiff could not maintain the action. Plaintiff alleged exceptions.

GRAY, C. J.[86] The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Tower v. Utica Railroad, 7 Hill (N. Y.) 47, 42 Am. Dec. 36 [ante, p. 388]; Abbott v. Bradstreet, 55 Me. 530; Pullman Palace Car Co. v. Smith, 7 Chi. Leg. N. 237. Whether the defendants' regulations as to keeping the doors of the staterooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. Fox v. Adams Express Co., 116 Mass. 292.

Exceptions overruled.

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## ADAMS v. NEW JERSEY STEAMBOAT CO.

(Court of Appeals of New York, 1896. 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616.)

O'BRIEN, J.[87] On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without

[86] The statement of facts has been rewritten.

[87] Parts of the opinion have been omitted.

negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is whether the defendant is, in law, liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at General Term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. Story, Bailm. § 464; 2 Kent, Comm. 592; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

* * *

It was held in Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to

pay an additional charge for the comfort and luxury of a special apartment in a special car. * * *

But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract, before the question of responsibility can arise, whether the passenger be in one of the sleeping berths, or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves, and with reference to all the circumstances of the case.

The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence. The judgment should be affirmed. All concur, Judgment affirmed.[88]

[88] In McKee v. Owen, 15 Mich. 115 (1866), an action against a common carrier by steamboat for money stolen from a stateroom while its owner was asleep, Christiancy, J., said: "In Van Horn v. Kermit (N. Y. Com. Pl.) 4 E. D. Smith, 454, the doctrine that to hold shipowners liable for baggage it must be placed beyond the passenger's reach, in the special charge of the officers of the ship, is expressly denied, because the passenger must necessarily require access to it, and unless particularly enjoined to deposit it in some other place on shipboard, there is no place more appropriate than the stateroom or cabin assigned to him for use during the voyage. * * * A trunk actually delivered into the hands of the carriers may often be required by the passenger on the way, and when he obtains access to it, has it in his own hands, or opens it to take out or put in articles, it is in his own custody pro hac vice, and for a loss occurring at such moments the carrier would not ordinarily be responsible; and yet the moment it goes back into the custody of the carrier, his responsibility revives. And so in the present case, while the plaintiff was up with the clothing on her person, it was in her own custody; but when

## PARKER v. NORTH GERMAN LLOYD STEAMSHIP CO.

(Supreme Court, Appellate Division, Second Department, 1902. 74 App. Div. 16, 76 N. Y. Supp. 806.)

HIRSCHBERG, J.[39] * * * The evidence establishes the facts * * * that while in course of transportation to said place said trunks were detained in England at Queensboro Pier, at the mouth of the river Thames, for inspection by the British customs authorities; that notice of their arrival was sent to the plaintiff, but that before their removal, and while they were still in the custody of the customs authorities, the trunks and the pier on which they lay were destroyed by fire; and that the plaintiff's wife, before the suit was brought, duly assigned to him her claim and cause of action. * * *

But, aside from the general question of the defendant's liability under the terms of the receipt, I think the peril which destroyed the property was beyond any guaranty assumed. The case of Howell v. Railway Co., 92 Hun, 423, 36 N. Y. Supp. 544, seems quite decisive. There the plaintiff had purchased a ticket at Blythe, Canada, for passage over the defendant's road to Suspension Bridge, in this state, and his baggage, checked for the same destination, was destroyed by fire at the custom house in the latter place on the night of its arrival. In holding that the plaintiff could not recover the amount of his loss from the common carrier, the court said (92 Hun, 424, 36 N. Y. Supp. 544): "Prior to the fire, and on its arrival at Suspension Bridge, the baggage was taken into the possession of the customs officers of the United States, pursuant to the statute and regulations of that government relating to customs, and remained in the possession and custody of those officers in the room appropriated to such purpose at the time of the loss by fire which destroyed the building in which the baggage then was. The property was not in the possession or under the

laid aside in her room, while she slept, it was, as I have endeavored to show, in the custody of the defendants as carriers." The court was equally divided, and judgment for the carrier was affirmed.

In Nashville, etc., Ry. Co. v. Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947 (1903), Wilkes, J., said: "Unless the passenger shall assume and retain the exclusive possession and control of the baggage, and either directly or impliedly deny any right of possession or custody to the employés of the road, the baggage must be considered as being in the possession of the employés of the sleeping car company, who are at the same time employés of the railroad company. * * * If the baggage is deposited under the berth, or over it, or at any other convenient place, when the passenger retires for sleep, it must be considered as in the custody of the employés of the road, and the railroad company must be considered as insuring its safety."

That articles in a passenger's stateroom may be so in the carrier's custody as to make him liable for loss without fault, see Mudgett v. Steamboat Co., 1 Daly, 151 (1861); Gore v. Transp. Co., 2 Daly, 254 (1867); Gleason v. Goodrich Trans. Co., 32 Wis. 85, 14 Am. Rep. 716 (1873). But see Am. S. S. Co. v. Bryan, 83 Pa. 446 (1877); The Humboldt (D. C.) 97 Fed. 656 (1899); The R. E. Lee, 2 Abb. 49, Fed. Cas. No. 11,690 (1870).

[39] Parts of the opinion are omitted. An extract upon another point is printed ante, p. 22, note 3.

control of the defendant at the time of the loss, nor was it in any sense the fault of the defendant that it was not so. On the arrival from Canada into the state of New York it was taken into the possession of such customs officers, as was usual, and required by the customs and navigation laws of the United States and the regulations adopted by the secretary of the treasury pursuant to such laws. The defendant, therefore, is not liable as a common carrier for the loss, unless it may, for some cause, be attributable to its negligence. It is not claimed that the fire was chargeable to any fault on its part."

This reasoning applies to the case at bar, and is equally applicable where the fire occurs in transit as where it occurs in the custom house at the place of destination. There is no proof of deviation and nothing tending in any way to charge the defendant, directly or indirectly, with the fire at Queensboro Pier. The parties must be presumed to have contracted with the common knowledge of the necessity for customs detention and inspection, and the burden was on the plaintiff to make provision for the passage of his property beyond the borders of the foreign territory if nondutiable. The defendant was wholly powerless to prevent its seizure and detention, and on the authority of the case cited cannot be held liable for its destruction, while in the possession of the foreign government, by a fire which it did not occasion, and which it could not, by any possible act of diligence, have prevented. * * *

The judgment should be reversed.[40]

[40] Compare cases p. 117, note 4.

For other cases not within the rule of exceptional liability, see Transportation Not Within the Contract of Carriage, ante, p. 88; Excuses for Failure to Transport and Deliver, ante, p. 113.

# CHAPTER IV

# LIMITATION OF LIABILITY

## SECTION 1.—LIMITATION OF LIABILITY BY NOTICE

### HOLLISTER v. NOWLEN.

**(Supreme Court of New York, 1838. 19 Wend. 234, 32 Am. Dec. 455.)**

This was an action against the defendant as a common carrier for the loss of the plaintiff's trunk and contents. A case was agreed on between the parties stating the following facts:

The defendant was a member of a company, the proprietors of the three daily lines of stagecoaches running between Canandaigua and Buffalo, one of which was called the Telegraph line. * * * On the 20th July, 1833, before daylight in the morning, the plaintiff left Avon in the defendant's coach on his way to Buffalo. The trunk was placed in the boot behind the coach, which was carefully secured by strong leather covering, fastened with strong leather straps, and buckles, and was made secure against any loss except by violence. After proceeding about three miles it was discovered that the straps confining the cover of the boot had been cut, and the plaintiff's trunk with its contents had been feloniously stolen and carried off. There was no negligence on the part of the defendant or his servants in relation to the trunk, further than may be implied from the facts above stated. The plaintiff left the stage, went back to Avon, and reported his loss; and the defendant offered a reward, and made all proper efforts for the recovery of the property, but without success.

The Telegraph line was established in 1828. A public notice that baggage sent or carried in the Telegraph line would be at the risk of the owner thereof, printed on a large sheet, had been uniformly kept placarded in most of the stage offices and public houses from Albany to Buffalo; and particularly such notice had been continually affixed up in the stage office and principal public houses at Utica, where the plaintiff had resided for the last three years before the trunk was lost. It was stipulated that should the court be of opinion that the plaintiff was entitled to recover, judgment should be entered in his favor for $116.75, and interest from July 20, 1833, besides costs.

BRONSON, J.[1] * * * I should be content to place my opinion upon the single ground that if a notice can be of any avail, it must be

[1] **Parts of the statement of facts and of the opinion are omitted.**

directly brought home to the owner of the property; and that there was no evidence in this case which could properly be submitted to a jury to draw the inference that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed; and there is another case before the court where the judge at the circuit thought the evidence sufficient to charge the plaintiff with notice. It will therefore be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? * * * The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer, prevailed in England for only a short period. In Smith v. Horne, 8 Taunt. 144, Burrough, J., said: "The doctrine of notice was never known until the case of Forward v. Pittard, 1 T. R. 27, which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall in 1804, when the case of Nicholson v. Willan, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied."

Whatever may be the rule where there is in fact a special contract, the learned judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793), Lord Kenyon had expressly laid down a different rule in Hide v. Proprietors, etc. 1 Esp. R. 36. He said: "There is a difference where a man is chargeable by law generally, and where on his contract. Where a man is bound to any duty and chargeable to a certain extent by the operation of law, in such case, he cannot by any act of his own discharge himself." And he put the case of common carriers, and said, they cannot discharge themselves "by any act of their own, as by giving notice, for example, to that effect." This case was afterwards before the King's Bench, but on another point. 1 T. R. 389.

The doctrine in question was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has ex-

isted in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision.

Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read—these and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. See 1 Bell's Com. 474. After years of litigation, Parliament interfered in 1830 and relieved both the courts and the public, by substantially reasserting the rule of the common law. St. 1 Wm. IV, c. 68.

Without going into a particular examination of the English cases, it is sufficient to say that the question has generally been presented, on a notice by the carrier that he would not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; and the decisions have for the most part only gone far enough to say that if the owner do not comply with the notice by stating the true value of the goods and having them properly entered, the carrier will be discharged. In these cases, the carrier had not attempted to exclude all responsibility.

But there are two nisi prius decisions which allow the carrier to cast off all liability whatever. In Maving v. Todd, 1 Stark. R. 72, the defendant had given notice that he would not answer for a loss by fire, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In Leeson v. Holt, 1 Stark. R. 186, tried in 1816, he made a like decision; though he very justly remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; since by the common law a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the courts had departed from the law

of the land, and allowed what Jeremy's Treatise on Carriers, 35, 6, very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud (Batson v. Donovan, 4 B. & Ald. 21); others on the notion of a special acceptance or special contract (Nicholson v. Willan, 5 East, 507; Harris v. Packwood, 3 Taunt. 271); while in some instances it is difficult to say what general principle the court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. * * *

But it is enough for this case, that the question of fraud can never arise under such a notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum, unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier, is, that a special contract may be inferred from the notice. Independent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. * * *

But, conceding that there may be a special contract for restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a me-

chanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication could arise.

Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.[2]

Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the onus of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defence of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the Legislature, and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation.

The doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our Revolu-

[2] "We agree that, if the notice furnishes a defense, it must be either on the ground of fraud, or a limitation of liability by contract, which limitation it is competent for a carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms." Parke, B., in Wyld v. Pickford, 8 Mees. & W. 443 (1841).

tion. It has never been received in this, nor, so far as I have observed, in any of the other states. The point has been raised, but not directly decided. Barney v. Prentiss, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670; Dwight v. Brewster, 1 Pick. (Mass.) 50. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence. * * *

Judgment affirmed.[3]

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## OPPENHEIMER v. UNITED STATES EXPRESS CO.

(Supreme Court of Illinois, 1873. 69 Ill. 62, 18 Am. Rep. 596.)

This was an action brought by the appellants, wholesale jewelers in the city of Chicago, to recover from appellee the value of a box of merchandise which was delivered to the defendant at New York City for transportation to the plaintiffs. A jury having been waived in the court below, the cause was submitted to the court for trial, and judgment rendered for the plaintiffs for $50, from which judgment they appealed.

The testimony showed that the box contained watches and jewelry worth $3,800. The carrier placed it with express matter of ordinary value, and without his fault it was destroyed by a fire. Had its value been known, it would have been placed among the valuable articles, which were not destroyed.[4]

SHELDON, J. The question presented by this record is as to the effect of the clause in the receipt in this case restricting the liability of the company to $50, unless the value of the package was stated. The denial in the testimony that the consignors had knowledge of this condition in the receipt must be held to be overcome by the circumstances of the case. * * * They must be held to have had such knowledge.

The position is taken by appellants' counsel that it is incumbent upon the express company to show, not only that the consignors had knowledge of the contents of the receipt, but also that they assented to the same, and consented to be bound thereby.

A distinction exists between the effect of those notices by a carrier

[3] For shipment with knowledge of a usage to exonerate a carrier from his strict liability as evidence of an agreement to do so, see The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657 (1837); Boon v. The Belfast, 40 Ala. 184, 88 Am. Dec. 761 (1866); Pittsburgh, etc., Co. v. Barrett, 36 Ohio St. 448 (1881).

In Pickering v. Weld, 159 Mass. 522, 34 N. E. 1081 (1893), Allen, J., said: "A usage cannot override an express contract, neither can a usage be valid which is in contravention of an established rule of law. But it has often been held to be within the legitimate and proper scope of a usage of trade to regulate the time, place, and manner of the delivery of a cargo, where there is no express contract upon the subject; and under such circumstances the usage is deemed to enter into and form a part of the contract."

[4] The statement of facts has been rewritten and part of the opinion omitted.

which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer—in the former case, notice alone not being effectual without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient.

The rule in this respect is thus laid down by the Supreme Court of New York: "If he [the carrier] has given general notice that he will not be liable over a certain amount unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value and pay the premium. The carrier, in such case, is not bound to make the inquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice." Orange Co. Bank v. Brown, 9 Wend. 115, 24 Am. Dec. 129. See, also, 2 Greenleaf, Ev. § 215; Ang. on Carriers, § 245; Farmers' & M. Bank v. Champlain Trans. Co., 23 Vt. 186, 56 Am. Dec. 68; Moses v. Boston & M. Railroad, 4 Fost. (N. H.) 85, 55 Am. Dec. 222.

The distinction above adverted to has been recognized by this court. Western Trans. Co. v. Newhall et al., 24 Ill. 466, 76 Am. Dec. 736.

The common carrier is liable, as we find it frequently laid down, in respect to his reward, and the compensation should be in proportion to the risk.

As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust. Hollister v. Nowlen [ante, p. 395.] And such a limitation of the carrier's liability as the one in question is held to be reasonable and consistent with public policy.[5]

[5] Acc. Judson v. Western R. Corp., 6 Allen (Mass.) 486, 493, 83 Am. Dec. 646 (1863), semble; McMillan v. Michigan, etc., Co., 16 Mich. 79, 110, 93 Am. Dec. 208 (1867), semble; Earnest v. Express Co., 1 Woods, 573, Fed. Cas. No. 4,248 (1873), shipper protested that notice was invalid. Contra: Southern Ex. Co. v. Armstead, 50 Ala. 350 (1874), semble. In Duntley v. Boston & M. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610 (1890), and Klair v. Wilmington Steamboat Co., 4 Pennewill (Del.) 51, 54 Atl. 694 (1902), shipment with knowledge of such a notice was treated as showing assent to its terms.

In Railroad Company v. Fraloff, 100 U. S. 24, 25 L. Ed. 531 (1879), Harlan, J., for the court said: "It is undoubtedly competent for carriers of passengers,

But, independent of the qualifying provision contained in the receipt, we should be inclined to sustain the defendant's claim of exemption from liability on the ground of a want of good faith in not disclosing the value of the goods.

These consignors knew that there was a recognized distinction, on the part of the company, between valuable packages and ordinary freight; that they had their separate collectors of the two kinds, and the consignors were provided with signs to hang out to denote which one of the collectors they had goods for. They must have displayed the sign indicating that they had ordinary merchandise to be carried, as the box in question was delivered to that collector. In the blank receipts which they were so frequently filling out, there was a blank space after a dollar mark for filling in the amount the goods were valued at; this was a virtual request on the part of the company to state the value. There was an actual attempt here by the agent of the shippers to fill in this blank space; but, instead of inserting 3,800 (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer, is asserted in the cases of Chic. & A. R. R. Co. v. Thompson, 19 Ill. 578, and American Express Co. v. Perkins, 42 Ill. 459. Had the true value of goods been disclosed, there would have been an extra charge of $9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved.

The court below was justified in coming to the conclusion that the consignors elected to take the risk of the loss, rather than subject the plaintiffs to the enhanced charges that would have been made had the value of the package been disclosed. * * *

It is said the practice and course of dealing had been such on the part of the company as to amount to a waiver of the limitation, and to induce the consignors to believe that it would not be insisted upon. We do not find in the evidence sufficient to justify the assertion that the company's course of dealing had been such as to lead either the appellants or their consignors to infer that it did not insist upon the conditions embodied in the printed receipts.

Because the company, as shown by the evidence, had settled for

by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk."

Acc. Jacobs v. Central R. Co., 208 Pa. 535, 57 Atl. 982 (1904). A railroad which contracts for through transportation may by a provision in the bill of lading exempt itself from liability for loss beyond its own line, although the provision is unenforceable as a contract because the railroad gave the shipper no option of other terms. Ft. Worth, etc., Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846 (1900).

losses of bulky goods without raising the point whether, by the terms of the contract, it was discharged from liability, and, in one instance, paid the appellants for a loss exceeding $50 where there was no valuation, the company was not thereby precluded from questioning its liability in any case that might arise thereafter, and the appellants had no right to expect that it would not do so. The written contract speaks for itself what it is, and is not to be thus contradicted or modified by parol evidence. Evans v. Soule, 2 Maule & Sel. 2.

The judgment of the court below will be affirmed. Judgment affirmed.[6]

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## BURNS v. BOSTON ELEVATED RY. CO.

**(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 96, 66 N. E. 418.)**

MORTON, J. This is an action of tort for personal injuries. The plaintiff was riding on the front platform of a car belonging to the defendant, and as it rounded a sharp curve at the corner of Lowell and Brighton streets, in Boston, was thrown off by a sharp jerk, and received the injuries complained of. There was testimony tending to show that the speed was unusual and excessive, that the car was crowded, and that there were six or seven others on the platform. The plaintiff testified on cross-examination that he knew that there was a sign on the car that "Passengers riding on the front platform do so at their own risk," and finally said (though he denied it at first) that he knew that, according to the sign, when he rode on the front platform, if he had an accident such as happened, he took the risk. At the close of the plaintiff's evidence the judge directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to that ruling.

We think that the ruling was right. The rule in respect to passengers riding on the front platform must be regarded, it seems to us, as a reasonable rule, and such a rule as the defendant had a right to adopt. Sweetland v. Lynn & Boston R. R., 177 Mass. 574, 579, 59 N. E. 443, 51 L. R. A. 783, and cases cited. It would have had the right to prohibit absolutely passengers from riding on the front platform, and a passenger who, without sufficient excuse, knowingly violated the rule, and was injured in consequence thereof, would have been guilty of contributory negligence, and would not have been entitled to recover, even though the defendant had also been negligent. Wills v. Lynn & Boston R. R., 129 Mass. 351.

We do not think that the only alternatives open to the defendant were those of absolute prohibition or unqualified permission. The notice contained a fair warning that the front platform was regarded

[6] Compare Shaw v. Gt. Western Ry. Co., 1 Q. B. 373, 380 (1894). See Everett v. So. Exp. Co., ante, p. 97, and cases in note.

by the company as a place of exposure to danger, and that it was unwilling that passengers should ride there, unless they were content to take the risks of doing so; and it is not unreasonable, it seems to us, to say that a passenger who knew the rule, as the plaintiff did, and rode upon the front platform, accepted the risk, in the absence of anything to show that the rule had been waived by the company, or that it was not in force.

The rule is to be regarded, we think, as designed to promote the safety of passengers, by warning them that the front platform was or might be a place of danger, and that they rode there at their own risk, rather than as designed to protect the defendant from the results of its own negligence, or that of its servants or agents. And we think that, upon the undisputed testimony, the plaintiff must be held to have accepted the risk.

The fact that the car was crowded is immaterial. The plaintiff was not obliged to get onto a crowded car, and it was not negligence on the part of the defendant to take him as a passenger, because the car was crowded. Jacobs v. West End St. Ry., 178 Mass. 116, 59 N. E. 639. The fact that there were other passengers on the platform did not show that the rule had been waived by the defendant or was not in force. Their presence there was as consistent with the fact that the rule was still in force as that it was not. The case is very different from that of Sweetland v. Lynn & Boston R. R., supra, on which the plaintiff relies. There was abundant evidence in that case of a custom to use the front platform, and that the rule notifying passengers not to stand on the front platform was not in force.

Exceptions overruled.

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## BOERING v. CHESAPEAKE BEACH RY. CO.

**(Supreme Court of the United States, 1904. 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742.)**

BREWER, J. This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company. Her husband was joined with her as plaintiff, but no personal injury to him was alleged. The defense was that she was riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise." A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District (20 D. C. App. 500), and thereupon the case was brought here on error.

The contention of the plaintiffs is that the company was liable in any event for injuries caused by its negligence to one riding on its trains; and further, that if it were not liable for such negligence to one accepting a free pass containing the stipulation quoted, it was liable to Mrs. Boering, because it did not appear that she knew or assented to the stipulation. The trial court submitted to the jury the question whether she was, in fact, a free passenger, and as the verdict was in favor of the defendant, that question of fact was settled in favor of the company. Under those circumstances the recent decision of this court in Northern P. R. Co. v. Adams [post, p. 451] disposes of the first contention.

With reference to the second contention, the testimony of the two plaintiffs showed that the husband had attended to securing transportation; that he obtained passes for himself and wife, and that they had traveled on these passes before; that she knew the difference between passes (she called them "cards") and tickets, for on that day her husband had purchased a ticket for a friend who was traveling with them, and she had seen him use both ticket and passes. They further testified that she had not had either pass in her possession, and that her attention had not been called to the stipulation. Now, it is insisted that the exemption from liability for negligence results only from a contract therefor; that there can be no contract without knowledge of the terms thereof and assent thereto, and that she had neither knowledge of the stipulation nor assented to its terms; that therefore there was no contract between her and the company exempting it from liability for negligence.

Counsel refer to several cases in which it has been held that stipulations in contracts for carriage of persons or things are not binding unless notice of those stipulations is brought home to such passenger or shipper. We do not propose in any manner to qualify or limit the decisions of this court in respect to those matters. They are not pertinent to this case. They apply when a contract for carriage and shipment is shown. When that appears it is fitting that any claim of limitation of the ordinary liabilities arising from such a contract should not be recognized unless both parties to the contract assent, and that assent is not to be presumed, but must be proved. Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant.

Accepting this privilege, she was bound to know the conditions thereof. She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property, who grants a privilege, to hunt the party to whom the privilege is given, and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In

Quimby v. Boston & M. R. Co., 150 Mass. 365, 367, 23 N. E. 205, 5 L. R. A. 846, 847, a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said:

"Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire v. New York C. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston, H. T. & W. R. Co., 144 Mass. 284, 10 N. E. 836; Boston & M. R. Co. v. Chipman, 146 Mass. 107, 14 N. E. 940 [4 Am. St. Rep. 293]."

So in Muldoon v. Seattle City R. Co., 10 Wash. 311, 313, 38 Pac. 995, 996, 45 Am. St. Rep. 787: "We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought, at least, to take the trouble to look on both sides of the paper before he attempts to use them." See, also, Griswold v. New York & N. E. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Illinois C. R. Co. v. Read, 37 Ill. 484, 510, 87 Am. Dec. 260.

As was well observed by Circuit Judge Putnam in Duncan v. Maine C. R. Co. (C. C.) 113 Fed. 508, 514, in words quoted with approval by the Court of Appeals in this case: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

We see no error in the record, and the judgment of the Court of Appeals is affirmed.[7]

[7] Acc. Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491 (1894). Contra, see Carriers, 9 Cent. Dig. § 1253, 4 Dec. Dig. § 307 (2). Blair v. Erie Railway Co., 66 N. Y. 313, 23 Am. Rep. 55 (1876), was an action by an administratrix for the death of her intestate, an express messenger, killed in a negligent railroad wreck. The defense rested upon a clause in the railroad's contract with the express company, which, as the railroad contended, provided that in transporting the messengers of the express company it assumed no liability even for negligent injury. A majority of the court thought that the clause did not apply to negligent injury, and therefore affirmed a judgment for the plaintiff. Earl, J., believing that the clause was intended to cover negligent injury, dissented. He said, in part: "But it is claimed that the messenger was not bound by this agreement, in the absence of proof that he knew of it and thus can be held to have assented to it. He was not a passenger upon the train. He was upon the train in an express car, engaged in the separate business of the express company. He was in that car lawfully only as he was there under the agreement. He knew that he had not paid any fare, and that he had made no contract for his carriage. He must have known that he was there under some arrangement between the express company and the defendant, and that whatever right he had to

## SECTION 2.—LIMITATION OF LIABILITY BY CONSENT

### DORR v. NEW JERSEY STEAM NAVIGATION CO.

(Court of Appeals of New York, 1854. 11 N. Y. 485, 62 Am. Dec. 125.)

This was an action against the defendant, as a common carrier of goods upon the Long Island Sound, between New York and Stonington, for the loss and destruction of certain goods, intrusted to its care.

The declaration was in case, in the usual form prior to the enactment of the Code. The defendant pleaded the general issue; and also that the goods were received on board the steamboat Lexington, under a special agreement for the transportation thereof, in the following terms:

"New Jersey Steam Navigation Company, received of S. & F. Dorr & Co., on board the steamer Lexington, Child, master, two cases for E. Baker & Co., Boston, marked and numbered as in the margin, to be transported to Stonington, and there be delivered to railroad agent or assigns; danger of fire, water, breakage, leakage and all other accidents excepted, and no package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars.

"Freight, as customary with steamers on this line.

"N. B.—The company are to be held responsible for ordinary care and diligence only in the transportation of merchandise and other property shipped or put on board the boat of this line.

"Dated at New York, January 13th, 1840.

"Contents unknown. George Child, Master."

That while the merchandise was well and properly stowed on board the steamboat, and being carried pursuant to the contract, and without any carelessness or misconduct of the defendant, or its servants, or any defect in the boat, or its equipments, the boat, by mere casualty and accident, took fire and was consumed, with its cargo, including the merchandise of the plaintiffs; and thereby, by accident and casualty of fire, and not by any negligence, misconduct, or de-

be transported was as the servant of the express company. He was there not in his own right, but in the right of the express company, and hence he was bound by the arrangement that company made for him." Acc. Pittsburgh, etc. Ry. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 40 L. R. A. 101, 62 Am. St. Rep. 503 (1897); Illinois Cent. R. Co. v. Read, 37 Ill. 484, 510, 87 Am. Dec. 260 (1865). Contra: Brewer v. N. Y., L. E. & W. Ry. Co., 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647 (1891).

If a passenger, permitted to ride free on condition that the carrier shall be under no obligation to care for his safety, is a minor, the condition is void of effect. Flower v. London & N. W. Ry. Co., 2 Q. B. 65 (1894); Chicago, R. I. & P. Ry. Co. v. Lee, 92 Fed. 318, 34 C. C. A. 365 (1899). Contra: Griswold v. N. Y. & N. E. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115 (1885).

fault of the defendant, the merchandise was not delivered at Stonington, and became lost to the plaintiffs.

The plaintiffs demurred to this plea; and the Superior Court gave judgment against the defendant thereon. The issues of fact were afterwards tried, before a jury, and a verdict rendered in favor of the plaintiffs for $3,247.90. The Supreme Court, in the First District, having subsequently denied a motion for a new trial, on a bill of exceptions, and perfected judgment in favor of the plaintiffs, the defendant took this appeal.

PARKER, J. The courts of this state have steadily adhered to the common-law rule that a common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Since the very full and learned discussion of that question in Hollister v. Nowlen [ante, p. 395] and Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470, it has been regarded as settled upon mature deliberation, and the conclusion arrived at in those cases has been uniformly acquiesced in and followed. Camden Co. v. Belknap, 21 Wend. 354; Clark v. Faxton, Id. 153; Alexander v. Greene, 3 Hill, 9; 7 Hill, 533; Powell v. Myers, 26 Wend. 594. These decisions rest on the very satisfactory reasons that the notice was no evidence of assent on the part of the owner, and that he had a right to repose upon the common-law liability of the carrier, who could not relieve himself from such liability, by any mere act of his own.

But the question here presented is of a very different character. It is whether it is competent for the carrier and the owner, by an agreement between themselves, to establish conditions of liability different from those cast by law upon a common carrier. I think this question is distinctly presented by the demurrer to the second plea, and, it seems to me, also to be involved in the decisions made at the trial of the issue of fact; for the exceptions to the common-law liability, being made in the bill of lading and delivered to the agent of the plaintiffs, must be deemed to have been agreed upon by the parties. * * * If such is not the legal inference, then it was a question of fact for the jury to decide what was the agreement between the parties, and in that case the same question of law would still be presented for decision.

The plaintiffs rely upon the case of Gould v. Hill, 2 Hill, 623. It was there broadly decided by a majority of the late Supreme Court, Nelson, C. J., dissenting, that common carriers could not limit their liability, or evade the consequences of a breach of their legal duties, as such, by an express agreement or special acceptance of the goods to be transported. That decision rested upon no earlier adjudication in this state, though the question had been previously discussed and obiter opinions upon it sometimes expressed by judges, in deciding the question whether a carrier could lessen the extent of his liability, by notice. But the case of Gould v. Hill has been deliberately overruled by the present Supreme Court, in two carefully considered cases, viz.,

Parsons v. Monteath, 13 Barb. 353, and Moore v. Evans, 14 Barb. 524. In both those cases the question is examined with much ability, and, I think, the unsoundness of the conclusion in Gould v. Hill most satisfactorily shown. I am not aware that Gould v. Hill has been followed in any reported case. In Wells v. Steam Navigation Company, 2 N. Y. 209, Bronson, J., who seems to have concurred with Judge Cowen in deciding Gould v. Hill, speaks of the question as being still, perhaps, a debatable one.

That a carrier may, by express contract, restrict his common-law liability, is now, I think, a well-established rule of law. It is so understood in England (Kenrig v. Eggleston, Aleyn, 93; Morse v. Slue [ante, p. 313]; Catley v. Wintringham, Peake's N. P. Cas. 150; Gibbon v. Paynton [post, p. 457]; Leeson v. Holt, 1 Starkie, 186; Harris v. Packwood, 3 Taunt. 264; Wyld v. Pickford [ante, p. 399, note 2]; Southcote's Case, 4 Co. 84), and in Pennsylvania (Camden & A. R. Co. v. Baldauf, 16 Pa. 67, 55 Am. Dec. 481; Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653; Bingham v. Rogers, 6 Watts & S. 495, 40 Am. Dec. 581). In other states, where the question has arisen whether notice would exclude the liability of the carrier, it seems to have been taken for granted that a special acceptance would do so; and in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 382, 12 L. Ed. 465, it was so held by the Supreme Court of the United States. For the concurrent opinions of elementary writers in favor of this doctrine, see Story on Bailm. § 549; Chitty on Cont. 152; 2 Kent, Com. 606; Angell on Carriers, §§ 59, 220, 221.

Upon principle, it seems to me, no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests; no one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier; if the owner chooses to relieve him, and assume the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of compensation, and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation cannot, without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves; they are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability, where the parties have said nothing on the subject; but, if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so.

It is true, a common carrier exercises a quasi public employment, and has public duties to perform; that he cannot reject a customer, at pleasure, or charge any price that he chooses to demand; that if he refuses to carry goods according to the course of his employment,

without a sufficient excuse, he will be liable to an action, and that he can only demand a reasonable compensation for his risk and service (Bac. Abr. Carriers, B; 2 Kent, 599; Story on Bailm. 328; Coggs v. Bernard [ante, p. 317]; Boulston v. Sandiford, Skin. 279; Gisbourn v. Hurst, 1 Salk. 249; Jackson v. Rogers [ante, p. 16]; Pickford v. Grand Junction Ry. Co., 8 Mees. & W. 372; Dwight v. Brewster [ante, p. 34]; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398 [ante, p. 17]); and that an action will lie against him upon a tort, arising ex delicto, for a breach of duty (Orange County Bank v. Brown [ante, p. 321]). In such case, there being no special contract, the parties are supposed to have acted with a full knowledge of their legal rights and liabilities, and there may be, perhaps, good reason for the stringent rule of law, which makes the carrier an insurer against all except the act of God and the public enemy.

But when a special contract is made, their relations are changed, and the carrier becomes, as to that transaction, an ordinary bailee and private carrier for hire. This neither changes nor interferes with any established rule of law; it only makes a case to be governed by a different rule. To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter in no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.

The judgment of the Supreme Court should be reversed, and judgment be given for the defendant on the demurrer, with leave to the plaintiffs to reply, on terms, and a new trial should be awarded on the issue of fact.

Judgment accordingly.*

* In Michigan Central Railroad Co. v. Hale, 6 Mich. 243, 260 (1859), Martin, C. J., said: "The principle usually suggested as that upon which [rests] the right of the carrier to make a contract by which his liability will be limited or restricted is that stated by Bronson, J., in Hollister v. Nowlen, 19 Wend. (N. Y.) 247, 32 Am. Dec. 455, viz.: That 'the person intrusted with the goods, although he usually exercises that employment, does not, in the particular case, act as a common carrier.' The same idea is also thrown out by Mr. Justice Nelson, in New Jersey Steam Nav. Co. v. Merchants' Bank, 16 How. 344, 12 L. Ed. 465, where he says: 'The owner, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or neglect.' Whether this be the correct principle upon which to base this right, or not, it is very certain that all the cases from the time of Lord Coke down, recognize this right of the carrier to contract respecting his employment, and thereby to diminish his liability. But this right is recognized as a power to contract, not to restrict. For my own part, I cannot appreciate the correctness of the reason, or accede to the principle, upon which this right is based. It has sprung, I think, from the undue prominence given to the idea that the carrier was, by the contract, restricting his liability, and in forgetfulness of the fact that such contract is the mutual act of parties in relation to a matter of private business. Now, it is true that the occupation of a carrier is a public employment, in a

## McMILLAN v. MICHIGAN SOUTHERN & N. I. R. CO.

(Supreme Court of Michigan, 1867. 16 Mich. 79, 93 Am. Dec. 208.)

Action on the case against a railroad company as a common carrier for the loss by fire in its station at Detroit of certain goods belonging to the plaintiff, including two barrels of eggs which had been delivered to the defendant at Adrian to be carried to Detroit. Defendant gave a bill of lading for the eggs which contained a clause exempting it from liability for loss by fire. Defendant pleaded the general issue. The case was tried without a jury on stipulations which admitted the facts stated above, and other facts which tended to show that defendant was not to blame for the fire. The trial court gave judgment for the defendant. The case was afterwards taken to the Supreme Court, where Judge Cooley delivered an opinion in which he discussed fully the questions of law involved. He came to the conclusion that, as a reasonable time had not elapsed for the consignee to remove his goods after being notified of their arrival, the railroad was not relieved from liability by the fact that the transportation was over and the goods placed in a freight house. On this question the court was evenly divided. He further decided that a Michigan statute which forbade the railroad to abridge its common-law liability did not prevent a shipper's releasing it from liability by contract. The opinion continued as follows, the other judges concurring in this part of it:

certain sense; that is, that he undertakes to carry for all persons indifferently for hire. But, in my view, this undertaking fixes his character, irrespective of rates and risks, and he only abandons it by refusing to carry. The duties and liabilities which the law imposes upon him are only imposed because the public character has been already assumed by him. They do not go to create it. When that character has been assumed, and so long as it continues, it is the right of every person to require of the carrier the transportation of his property along his route, upon the payment of freight. This cannot be refused, although it may be regulated. In the absence of any contract, the law imposes upon the carrier the extraordinary liability of insurer against all loss, unless occasioned by the act of God or the public enemy; and this becomes the terms of transportation, and may be called the contract of the parties, arising immediately upon the delivery of the property for carriage. But the law only makes a contract for the parties, or imposes a liability when they have made no contract for themselves. The employer may procure the transportation of his property upon such terms as he may deem most advantageous to himself, if he can procure the carrier's assent to such terms; and, in that event, the carrier is none the less a common carrier, although acting under a special, and not an implied, contract. In my judgment, he acts as a common carrier so long as he carries for all indifferently, whether under the common-law liability, or under a contract with his employer. * * * But whatever my own view of this subject may be (and the court expresses no opinion upon it)—whether the carrier lays down, in the particular instance, his public character or not—we are all agreed that the law does not compel persons dealing with carriers to rely and insist upon this liability which it primarily imposes in their favor. In these, as in all other cases, the law recognizes the competency of parties to manage their own affairs, and to make such contracts in respect to them as they may deem to be most advantageous, and when the extent of the risk and responsibility of the

COOLEY, J.[10] * * * A much more difficult question is, what shall constitute the proof of a contract, in the absence of distinct evidence that the parties have consulted and agreed upon terms? The practical difficulty, amounting almost to an impossibility, of bringing the carrier and his employer together on every occasion for the discussion of terms, has led to the adoption by carriers of a printed form of contract, which is put into the hands of the consignor, and by its terms purports to bind him to its conditions; but it is strongly insisted that there ought to be more satisfactory evidence of assent on the part of the consignor to modify any of his common-law rights than is derived from the mere receipt of a paper from the carrier, framed to suit the interest of the latter, and which the consignor may never have read. * * *

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one. Brown v. Eastern R. R. Co., 11 Cush. (Mass.) 97. And if delivery of the bill of lading was made to the consignor under such

carrier, on the one hand, and the rights and liabilities of his employer, on the other, have been ascertained and fixed by the contract of the parties themselves, the law applies the maxim, 'Expressum facit cessare tacitum.' * * * What principle of public policy, superior to that which secures to every citizen the right to control his own affairs, is contravened, or what law is violated by him, in making the contract? He renounces the benefit of a liability which the law authorizes him to insist upon; and by this renunciation, which is voluntary, and can never be compulsory, the carrier is relieved from such liability."

—In the following jurisdictions, among others, there are statutory restrictions upon a common carrier's power to limit his liability by contract:

*Iowa*—Code, § 2074; Powers v. Chicago, etc., Co., 130 Iowa, 615, 105 N. W. 345 (1905).

*Kansas*—Gen. St. 1897, c. 69, § 17; St. Louis & S. F. Ry. Co. v. Sherlock, 59 Kan. 23, 51 Pac. 899 (1898).

*Kentucky*—Const. § 196; Adams Express Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412 (1904).

*Michigan*—Comp. Laws 1897, §§ 5239, 6289; McMillan v. Mich. R. Co., 16 Mich. 79, 93 Am. Dec. 208 (1867).

*Nebraska*—Const. art. 11, § 4; Railroad Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508 (1897).

*Texas*—Rev. St. 1895, art. 320; Railroad Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643 (1892).

*Virginia*—Code 1904, § 1294c (24).

*United States*—See Hepburn Act, 34 Stat. pp. 584, 595 (U. S. Comp. St. Supp. 1909, p. 1149).

*England*—Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31; Peek v. No. Staffordshire R. Co., 10 H. L. Cas. 473, 506-7, 509 (1863).

[10] The statement of facts has been rewritten, and parts of the opinion omitted.

circumstances as to lead him to suppose it to be something else—as, for instance, a mere receipt for money—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such. King v. Woodbridge, 34 Vt. 565. But except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not.

The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms, taking whatever the railroad companies see fit to give them, and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or, if we may be allowed to state the same thing in different words, as everybody is negligent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the outset, whither it will lead us.

Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties, though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident, or mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties compotes mentis in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight, or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freights in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract. * * *

It is said, however, that these special contracts must be held void for want of consideration unless it is shown that, in return for the release of the carrier from his extraordinary liability, he on his part has made a deduction in the rates of freight. What does appear in the present case is, that the carrier, in consideration of the promise by the consignor to release him from certain liabilities, and to pay him certain moneys, agrees on his part to carry the goods for the sum named. I do not see how we can assume that the charges are the same that they would have been had the release been omitted. If by the charter of a railroad corporation maximum rates had been established, and the corporation had attempted to charge these rates for a restricted liability, a case would be presented coming within the principle of this objection. Bissell v. New York Central R. R. Co., 25 N. Y. 449, 82 Am. Dec. 369, per Selden, J. But no such case is before us here, and a consideration appears which, for aught that is shown by the record, is sufficient.

It was also said on the argument that a rule such as we have now laid down would place the public at the mercy of the railroad companies, who would refuse to give any other than restricted bills of lading. It is enough for us to say in this case that railroad companies chartered as common carriers have no such power, and the consignor can assent to the restriction in each instance, or refuse to assent, at his option. If the corporations decline to transport goods as common carriers when that is the condition upon which they hold their franchises, there would be no difficulty, I apprehend, in applying the proper remedy. * * *

For the eggs delivered to the defendants at Adrian and Hudson, under an exemption from liability for losses in consequence of fire in the depot, the defendants cannot be held liable under the principles hereinbefore stated.[11]

[11] For cases in accord, see Carriers, 9 Cent. Dig. § 693, 4 Dec. Dig. §§ 53, 153. In Mo., K. & T. Ry. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434 (1906), the court held binding a limitation of liability in a bill of lading delivered unsigned to an agent of the shipper who could not read. In Watson v. Railroad, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454 (1900), a like decision was made as to a passenger ticket.

In Anchor Line v. Dater, 68 Ill. 369 (1873), Breese, C. J., said: "The bill of lading delivered to the consignors relieves the carrier from liability for loss by fire, while the property is in transit or while in depots, etc. This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed. The court, sitting as a jury, did not find evidence sufficient to justify it in presuming assent from the mere acceptance of the receipt. The shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone. It is in proof that its terms and conditions were not known to these shippers, although they had accepted a large number of them in the course of their business with the appellants. The terms and conditions of this bill of lading, or receipt, were inserted for the purpose of limiting the liability appellants were under by the common law They should appear plainly in the instrument, be un-

## MADAN v. SHERARD.

(Court of Appeals of New York, 1878. 73 N. Y. 329, 29 Am. Rep. 153.)

* * * This action was brought against defendant, as president of the New York Transfer Company, a company engaged as a common carrier in the business of transferring baggage in the city of New York, to recover the value of a trunk and its contents, alleged to have been lost while in its hands. The answer alleged that the trunk was received by the company under a special contract, which, among other things, limited defendant's liability to $100. * * *

ANDREWS, J.[12] The circumstances under which the plaintiff received the receipt or paper alleged to be a contract are very similar to those in the case of Blossom v. Dodd, 43 N. Y. 270, 3 Am. Rep. 701. The defendant's agent came into the car in which the plaintiff was seated, called for baggage, received the plaintiff's check for his trunk, and directions for its delivery, made an entry in pencil in his tally book, marked on the receipt the date, the number of the check, and the place of delivery of the trunk, handed it to the plaintiff and immediately passed on; nothing further being said to or by the plaintiff. The plaintiff folded the paper, and without looking at, or reading it, put it in his pocket. The car was dimly lighted, and the plaintiff could not in the place where he was seated have read the receipt. He saw the agent writing on the paper, and supposed he was writing his address, and in answer to a question, put on cross-examination, the plaintiff said that he knew the paper related to the carriage of his baggage.

The receipt is an exhibit in the case, and it purports to be a contract of very special character between the plaintiff and the defendant for the carriage of the property represented by the check. It contains

derstood by the consignor, and knowingly accepted as the contract of the parties, and intended to evidence the terms of the contract. These were points for the court trying the case, and the finding of the court in this respect cannot be disturbed."

Acc. So. Ex. Co. v. Moon, 39 Miss. 822 (1863), semble. And see Gaines v. Union, etc., Co., 28 Ohio St. 418, 443 (1876). But compare Cin., etc., R. Co. v. Berdan, 22 Ohio Cir. Ct. R. 326, 12 O. C. D. 481 (1901). See, further, as to the law of Illinois, Merchants' Despatch Tr. Co. v. Joesting, 89 Ill. 152 (1878); Atchison, etc., Ry. Co. v. Bilinsky, 107 Ill. App. 504 (1903); Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041 (1906), criticised in 1 Illinois Law Rev. 400; Coates v. C., R. I. & P. R. Co. 239 Ill. 154, 87 N. E. 929 (1909); Rev. St. Ill. c. 114, § 33, interpreted in Chicago & N. W. R. Co. v. Chapman, 133 Ill. 96, 104, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587 (1890).

In some states statutes require assent to limitation of liability to be evidenced otherwise than by mere acceptance of a bill of lading; e. g., *Dakota*, Civ. Code, § 1263; *South Dakota*, Civ. Code, § 1584; Hartwell v. No. P. Ex. Co., 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342 (1889); *Georgia*, Code, § 2068; Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37 (1893); *Michigan*, Comp. Laws 1897, §§ 5239, 6239.

[12] Parts of the statement of facts are omitted.

several hundred printed words, and acknowledges the receipt by the defendant of the trunk, "subject to this bill of lading," which in the margin is designated "domestic bill of lading," to be delivered in Forty-Seventh street, New York, and then follows a declaration that it is mutually agreed that the defendant shall not be liable for "merchandise, money or jewelry, contained in baggage, nor for loss by fire, nor in case of loss or damage or detention by reason of negligence or otherwise, for an amount exceeding $100 upon any trunk, etc., including the contents thereof, unless specially agreed for in writing and noted hereon, and the extra risk paid therefor."

There is a further provision that the company shall not be liable for baggage delivered to railroad, steamboat or steamship lines, after the same has been left at the usual place of delivery, and also that it "shall not be liable for loss or damage unless the claim therefor be made in writing with this contract annexed, at their principal office, within thirty days after such loss or damage," and the paper concludes with the statement "that the owner hereby agrees that the company shall only be liable as above."

This receipt differs in some respects from the one in Blossom v. Dodd. It is printed in larger type, and upon a larger piece of paper. The words "domestic bill of lading" were not in the receipt in the case of Blossom v. Dodd, nor did it contain in terms any exemption from liability in case of loss by negligence. The main difference in the general appearance of the two receipts is that the one in this case can be more easily read, and the fact that it was intended as a special contract would be more readily discovered on a casual observation.

The judge on the trial submitted it to the jury to find whether the plaintiff accepted the receipt as the contract between him and defendant, in respect to the trunk, and charged that, if it was presented to and received by him as the contract, he could not recover more than $100, but that, if the plaintiff did not know that it was proffered as a contract, and received it, not knowing its contents and supposing that it was given simply to enable him to trace his property, or as a mere receipt, then the plaintiff was not bound by its limitations. The learned judge subsequently qualified this part of his charge, by the statement that if the paper was handed to the plaintiff under such circumstances that he might have read it, and neglected to do so, he was bound by its contents. The defendant's counsel requested the court to instruct the jury, as matter of law, that the delivery of the receipt to the shipper, at the time of the receipt of the property, constituted a contract under the circumstances of the case, and that the plaintiff was limited in his recovery to $100. The court refused this instruction, and the defendant excepted. The jury rendered a verdict for the full value of the trunk and contents.

We are of the opinion that the charge made was as favorable to the

defendant as he was entitled to. It is not denied that the defendant is liable for the full value of the trunk and its contents, unless the common-law liability of the carrier has been modified by contract with the plaintiff. The defendant was, therefore, bound to establish, in order to relieve itself from liability for the full damages sustained by the plaintiff, that there was a contract between the parties for the carriage of the trunk, upon the special terms contained in the receipt. The decision in Blossom v. Dodd is an authority that no such contract arises in law from the acceptance of a receipt under the circumstances of this case. They do not justify the inference or implication that the plaintiff assented to be bound by the special contract contained in the receipt. There was no explanation of the contents of the paper, no conversation indicating that the trunk was to be carried on special terms, and no opportunity afforded to the plaintiff to assent to or dissent from the alleged contract. To infer, under the circumstances, an assent on his part to a contract exempting the carrier absolutely from responsibility for loss in certain cases, and limiting his liability in any case to $100, including cases of loss by the carrier's own negligence, would be making an inference contrary to the natural import of the transaction. The plaintiff, on receiving the paper, had, from the nature and circumstances of the transaction, a right to regard it as designed simply as a voucher to enable him to follow and identify his property; and if he had no notice that it was intended to subserve any other purpose, or that it embodied the terms of a special contract, his omission to read it was not per se negligence.

When a contract is required to be in writing, and a party receives a paper as a contract, or when he knows or has reason to suppose that a paper delivered to him contains the terms of a special contract, he is bound to acquaint himself with its contents, and if he accepts and retains it, he will be bound by it, although he did not read it. But this rule cannot, for the reasons stated, be applied to this case, and the court properly refused to charge, as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk, under its terms. The question whether, in a particular case, a party receiving such a receipt accepted it with notice of its contents, is one of evidence to be determined by the jury. The fact of notice may be proved by direct or circumstantial evidence. If circumstantial evidence is relied upon, the range of the testimony permissible can only be restricted at the point where the circumstances sought to be shown cease to have any relevancy to the inquiry. The fact that the receipt was printed in large type, and could be easily read; that it was received in the daytime, or when there was sufficient light to enable the traveler to read it; that he was acquainted with the methods of the business—these and other facts may be shown, not as conclusive against the recovery, but as bearing upon the ultimate fact to be proven, that the party, when he accepted the receipt, knew of its limita-

tions, or that it contained special terms for the carriage of the property.

We think that no error was committed on the trial, and that the judgment should be affirmed. All concur, except MILLER, J., absent.

Judgment affirmed.[18]

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## FONSECA v. CUNARD STEAMSHIP CO.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660.)

Contract, with a count in tort against a common carrier for damage to plaintiff's baggage. The case was referred to an auditor, and the parties agreed that his findings of fact should be final. He found that plaintiff was a steerage passenger on defendant's steamer from Liverpool to Boston, and that on the voyage plaintiff's baggage was ruined by defendant's negligence. Plaintiff had procured his ticket of defendant in London. It was entitled in bold type near its top "Passengers' Contract Ticket." On the margin it contained the following notice, among others: "All passengers are requested to take notice that the owners of the ship do not hold themselves responsible for * * * damage to luggage." At the bottom was printed: "Passengers' luggage is carried only upon the conditions set forth on the back hereof." On the back, among other things, was the following: "The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, * * * negligence of the company's servants, * * * or from any other cause of whatsoever nature." When plaintiff received this ticket his attention was not called to the fact that it contained a limitation of liability, and he examined it only enough to see that it

[18] Acc. Grossman v. Dodd, 63 Hun, 324, 17 N. Y. Supp. 855 (1892), affirmed 137 N. Y. 599, 33 N. E. 642 (1893); Springer v. Westcott, 166 N. Y. 117, 59 N. E. 693 (1901); Strong v. Long Island R. Co., 91 App. Div. 442, 86 N. Y. Supp. 911 (1904). See, also, Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68 (1867); Woolsey v. L. I. R. Co., 106 App. Div. 228, 94 N. Y. Supp. 56 (1905). Compare Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575 (1872); Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475 (1875); Gerry v. Am. Ex. Co., 100 Me. 519, 62 Atl. 498 (1905); Toy v. L. I. Co., 26 Misc. Rep. 792, 56 N. Y. Supp. 182 (1899); Mears v. N. Y., etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192 (1902).

In Kirkland v. Dinsmore, supra, plaintiff, on delivering to an express company a package containing money, took a receipt which stated the amount of money, the name and residence of the consignee, and that it was received upon terms and conditions printed in the body of the instrument, among which was an exemption of fire. The money was burned in transit. Andrews, J., said: "The plaintiff saw the signature of the agent and the printed matter preceding it, and the facts found leave no room to doubt that when he took the receipt he understood that it contained a contract on the part of the defendant in respect to the carriage of the money. * * * The defendant had a right to infer, from the plaintiff's acceptance of the receipt without dissent, that he assented to its terms, and now, after a loss has occurred, it is too late to object that he is not bound."

entitled him to his passage. The judge, on these facts, ruled that the validity of the negligence exemption depended upon the law of England, by which law it was valid. He also ruled that no conclusive presumption of assent to its stipulations arises from the acceptance of a passenger ticket, and that assent was not proved, and found for the plaintiff. The case is now by agreement reported to the Supreme Judicial Court, judgment to be entered according to their determination as to the correctness of the rulings.

KNOWLTON, J.[14] * * * The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract and proceeds to avail himself of its provisions is bound by the stipulations and conditions expressed in it, whether he reads them or not. Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Insurance Co. v. Buffum, 115 Mass. 343; Rice v. Manufacturing Co., 2 Cush. 80; Hoadley v. Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; Insurance Co. v. Railroad Co., 72 N. Y. 90, 28 Am. Rep. 113. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. Grace v. Adams, ubi supra; Railroad Co. v. Chipman, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293; Parker v. Railway Co., 2 C. P. Div. 416, 428; Harris v. Railway Co., 1 Q. B. Div. 515; York Co. v. Railroad Co., 3 Wall. 107, 18 L. Ed. 170; Hill v. Railroad Co., 73 N. Y. 351, 29 Am. Rep. 163. The cases in which it is held that one who receives a ticket which appears to be a mere check showing the points between which he is entitled to be carried, and which contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. Brown v. Railway Co., 11 Cush. 97; Malone v. Railroad Corp., 12 Gray, 388, 74 Am. Dec. 598; Henderson v. Stevenson, L. R. 2 H. L. Sc. 470; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations.

The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and, if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the de-

[14] The statement of facts has been rewritten, and part of the opinion omitted.

fendant company, affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods.

There is no reason why a consignor who is bound by the provisions of a bill of lading which he accepts without reading should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In Henderson v. Stevenson, ubi supra, the ticket was for transportation a short distance—from Dublin to Whitehaven—and the passenger was held not bound to read the notice on the back because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. Parker v. Railway Co., 2 C. P. Div. 416, 428; Harris v. Railway Co., 1 Q. B. Div. 515; Burke v. Railway Co., 5 C. P. Div. 1. The passenger in the last-mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. Steers v. Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453, is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In Quimby v. Railroad Co., ubi supra, the same principle was applied to the case of a passenger traveling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them. The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Forepaugh v. Railroad Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672, and cases cited; In

re Missouri S. S. Co., 42 Ch. Div. 321, 326, 327; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. Ed. 788.

Judgment for the defendant.[15]

[15] For tickets of such character that unknown stipulations in them were held ineffective, see Camden, etc., Co. v. Baldauf, 16 Pa. 67, 55 Am. Dec. 481 (1851); Balt. & O. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617 (1881); Mauritz v. N. Y., etc., R. Co. (C. C.) 23 Fed. 765 (1884); Ranchau v. Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761 (1899); Norman v. So. Ry. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809 (1902); Richardson v. Rowntree, [1894] App. Cas. 217; Mann Car Co. v. Dupre, 54 Fed. 646, 650, 4 C. C. A. 540, 21 L. R. A. 289 (1893), berth check.

In Hutchins v. Pa. R. Co., 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537 (1905), a through coupon ticket provided that liability for baggage should not exceed $100. The trial court directed a verdict of $160 for lost baggage. The Court of Appeals affirmed the judgment. Vann, J., said: "The defendant failed to conclusively establish a limitation by special contract of its common-law liability as a carrier. Jennings v. Grand Trunk Ry., 127 N. Y. 438, 28 N. E. 394. The form of the ticket suggests a proposition to make such a contract, for there was appended thereto the sentence, 'I hereby agree to all the conditions of the above contract,' with a blank for the signature of the purchaser, and another for the signature of the selling agent as a witness. The proposition was not accepted by the plaintiff, for she did not sign the ticket, nor have any reason to believe she was expected to. She did not assent to the proposition, nor agree to any limitation of liability on the part of the defendant, by merely accepting and using the ticket, for she did not read it or know its contents, nor was she told to read it or requested to sign it. She asked for through transportation to Carlsbad, N. M., over the defendant's railroad, and, when the ticket was delivered to her without request or remark by its agent, she had a right to presume she was getting what she asked for and what she paid for. A railroad ticket may be a contract or a voucher; and which the ticket of the plaintiff was, depended upon the inference to be drawn from what was said and done when she bought it, as well as on the form of the ticket and coupons. A ticket is no notice of conditions concealed therein by fine print, unless the attention of the holder is in some way directed to them. There is no presumption that a passenger assents to the terms of a complex ticket unless he has notice of what they are."

For tickets of such character that stipulations in them, though unknown, were held to bind the passenger, see Steers v. Liverpool Co., 57 N. Y. 1, 15 Am. Rep. 453 (1874); Aiken v. Wabash R. Co., 80 Mo. App. 8 (1899); Walker v. Price, 62 Kan. 327, 62 Pac. 1001, 84 Am. St. Rep. 392 (1900); Boling v. R. Co., 189 Mo. 219, 88 S. W. 35 (1905).

OBSCURE PROVISIONS.—Though a ticket or bill of lading is accepted as embodying the contract of carriage, the recipient, even if he fails to read it, is not bound by provisions of which he does not know, if they are so printed or placed as not fairly to apprise him, should he examine the document, that they are meant to be a part of his agreement. The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039 (1897), ticket for ocean passage, with words at foot, "See back," and on the back were conditions limiting liability for baggage headed: "Notice to Passengers. This contract is made subject to the following conditions"; N. Y., N. H. & H. R. Co. v. Sayles, 87 Fed. 444, 32 C. C. A. 485 (1898), clause in red ink stamped upon and at right angles to printed matter in bill of lading; Smith v. No. Ger. Lloyd (D. C.) 142 Fed. 1032 (1905), stipulation headed "Notice" in ticket for ocean passage; B. & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245 (1906); Lush, J., in Crooks v. Allen, 5 Q. B. D. 38, 40 (1879), bill of lading containing unusual exceptions in fine print. But cf. Ryan v. M., K. & T. Co., 65 Tex. 13, 57 Am. Rep. 589 (1886). See, also, Brown v. Eastern R. Co., 11 Cush. 97 (1853); La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 (1906); French v. Merchants' & Miners'

## SHELTON v. MERCHANTS' DISPATCH TRANSP. CO.

(Court of Appeals of New York, 1874. 59 N. Y. 258.)

Appeal from a judgment in favor of the plaintiff, entered upon the report of a referee in an action against a common carrier for the loss

Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A. (N. S.) 1006, 127 Am. St. Rep. 506 (1908).

NOTICES.—An attempt to restrict liability by notice which would be invalid if the notice were general, as by a public announcement read by the shipper, is equally invalid if the notice is contained in the contract of carriage. One who takes a ticket or bill of lading, though with knowledge of its terms, does not thereby indicate his assent to conditions contained in it which are fairly to be interpreted as mere notices or statements of rules not forming a part of the agreement. Brittan v. Barnaby, 21 How. 527, 16 L. Ed. 177 (1858), "Freight payable prior to delivery if required," stamped on back of bill of lading, and not shown to have been understood as part of the contract; Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859); Western Tr. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760 (1860); Railroad Co. v. Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297 (1872); Rawson v. Pa. R. Co., 48 N. Y. 212, 8 Am. Rep. 543 (1872); St. Louis, etc., Co. v. Tribbey, 6 Kan. App. 467, 50 Pac. 458 (1897), "whereas the railroad transports live stock only as per above rules."

In Mich. Cent. R. Co. v. Hale, supra, and Railroad Co. v. Manufacturing Co., supra, the documents given by the carrier were substantially in the following form: "Received from A. one bale of wool, to be transported to Detroit and there delivered to A. or order upon payment of the charges thereon and subject to the rules and regulations established by the company, of which notice is given on the back hereof." Indorsed: "Abstract from the rules and regulations as per published freight tariff. The company will not be responsible for damages occasioned by delays, * * * and all goods will be at owner's risk while in warehouses." The carrier was held liable for loss by fire in warehouse. Compare Gerry v. Am. Ex. Co., 100 Me. 519, 62 Atl. 498 (1905), receipt signed by express company in a book of blank receipts which they had given to the shipper, which receipt contained the printed words, "The property to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on the inside cover of this book."

LIMITATION OF TIME.—In some jurisdictions the statement "Good only one day from date of sale" in an ordinary pasteboard ticket is treated as an attempt to limit by special agreement the right to use it. If the person to whom it is issued buys without notice, he is entitled to use the ticket as if it were unrestricted, and, if ejected from the carrier's vehicle, may sue in tort. Railroad v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140 (1897); Dagnall v. So. Ry., 69 S. C. 110, 48 S. E. 97 (1903). And see Louisville & N. R. Co. v. Gaines, 99 Ky. 411, 36 S. W. 174, 59 Am. St. Rep. 465 (1896). In other jurisdictions the statement is treated as an integral part of the ticket indicating its temporary character; and, unless the carrier has led the buyer to believe it is selling him a ticket of a different sort, he cannot even get his money back if he is not permitted to ride on it after it has expired. Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617 (1874); Hanlon v. Ill. Cent. R. Co., 109 Iowa, 136, 80 N. W. 223 (1899); Coburn v. Morgan's, etc., R. Co., 105 La. 398, 29 South. 882, 83 Am. St. Rep. 242 (1901); Freeman v. Railway Co., 71 Kan. 327, 80 Pac. 592 (1905). And see Boston & L. R. Co. v. Proctor, 1 Allen, 267, 79 Am. Dec. 729 (1861); Johnson v. Concord R. Co., 46 N. H. 213, 88 Am. Dec. 199 (1865); Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238 (1896).

In Elmore v. Sands, supra, Earl, C., said: "The railroad company was not bound to issue the ticket in advance of the day on which it was to be used, and had the right to insist and provide that it should be used on the day when it was issued. * * * A passenger should see to it, if he prefers not to pay in the cars, that he has a proper voucher."

of goods carried. The referee found that the goods in question, marked "H. S. Shelton, Janesville, Wis.," were delivered to defendant at New York by H. B. Claflin & Co., from whom defendant had bought them; that Claflin & Co. took receipts for the goods, which a day or two later they exchanged for bills of lading containing this clause: "To be forwarded in like good order (dangers of navigation, collisions, and fire * * * excepted) to Chicago depot only, he or they paying freight and charges for the same as below." The goods duly reached Chicago, part on the evening of Saturday, October 7th, the rest on the morning of Sunday, October 8th. They were put into a freight house used by defendant, where they were burned in the Chicago fire, which broke out in the evening of October 8th.[16]

JOHNSON, J. The referee refused to find that, previous to the shipment in question, H. B. Claflin & Co. had been large shippers by the defendant's line, and had been always accustomed to obtain bills of lading for the goods shipped; and also that the defendants were carriers upon a route terminating at Chicago, and not extending to Janesville, Wis.; and that between the latter points transportation had to be performed by separate and independent carriers. These matters the referee refused to find, on the ground that they were immaterial to the rights of the parties. In this we think he erred, and for the following reasons:

Claflin & Co. were the agents of the plaintiff in respect to the transportation of the goods in question. His directions to them were to ship the goods to him at Janesville, Wis., by the defendant's line. The extent of the authority thus conferred, was considered in Nelson v. Hudson River Railroad Company, 48 N. Y. 498. It necessarily extends to the making of such contracts as the agents, in the honest exercise of their discretion, see fit to make.[17] The fact that the carriers and the agents employed have a habitual course of dealing in respect to contracts for transportation, is a material and important element in determining the construction to be put on their acts in any particular case. Mills v. Mich. Cent. Railroad, 45 N. Y. 622, 6 Am. Rep. 152. The delivery by the agents of the plaintiff, to the carriers, was made upon no particular agreement made at the time. The packages were marked with the address of the plaintiff, and receipts were

[16] The statement of facts has been rewritten.

[17] Though an agent to make a contract of shipment has authority to take a bill of lading containing usual exceptions (Waldron v. Fargo, 170 N. Y. 130, 62 N. E. 1077 [1902]), it has been held otherwise as to a cartman sent to deliver goods to a carrier with a shipping order filled out on a blank provided by the carrier (Russell v. Erie R. Co., 70 N. J. Law, 808, 59 Atl. 150, 67 L. R. A. 433 [1904]). And see Hallparn v. Joy S. S. Co., 50 Misc. Rep. 566, 99 N. Y. Supp. 464 (1906); Seller v. The Pacific, 1 Or. 409, Fed. Cas. No. 12,644 (1861). When goods are shipped by seller to buyer, usual exceptions in the bill of lading issued to the seller are available to the carrier in an action by the buyer. Nelson v. Hudson R. Co., 48 N. Y. 498 (1872). Contra: Transportation Co. v. Joesting, 89 Ill. 152 (1878). But see Mich. Cent. R. Co. v. Boyd, 91 Ill. 268 (1878).

signed by the agents of the defendants, at their receiving depot at New York. These receipts were in a bound receipt-book belonging to Claflin & Co., filled up by them, and signed by the agents of the defendants. They purport to be receipts, and not contracts for carriage. They were in the following form: "New York, Oct. 2, 1871. Received from H. B. Claflin & Co., in good order on board the M. D. for ——— the following packages, one case D. G. marked H. S. Shelton, Janesville, Wis.," and were signed "Gleason." In a day or two, but after the packages had been started on their way, the agents of the plaintiff, acting in accordance with the habitual mode of doing this business, sent the receipts to the defendant's office, and procured bills of lading for the goods, the giving of which was entered on the several receipts. These bills of lading expressed the actual contract of carriage between the parties who in fact made the contract, the defendants on the one hand, and H. B. Claflin on the other. When the goods were delivered and the primary receipts given, each of the parties was acting in a habitual method, and with a habitual understanding of what they were engaged in doing. The receipts were presented and signed with the view and expectation on both sides that bills of lading were in the usual course to be subsequently issued, expressing the intentions and engagements of the parties. This was their method of dealing, distinctly in their contemplation from the beginning, reasonable in itself and completely within the authority committed by the plaintiff to his agents, H. B. Claflin & Co. Any attempt on their part to claim a different agreement would have been an act of bad faith; because it would have been a departure from the understanding based upon the previous course of dealing of these parties. In the view we take of the relations and acts of these parties, the matters of fact which the referee held to be immaterial were plainly material, because they were essential to the disclosure of the actual contract of the parties. The bills of lading were obtained by the plaintiff's agents, in the exercise of their original authority to contract with the defendants for transportation, and these controlled the rights of the parties and displaced the common-law relation, which otherwise might have existed between them.

The order of time in which the business was actually transacted cannot be allowed to affect the rights of the parties. If H. B. Claflin & Co. were originally authorized to ship on bills of lading limiting the common-law liability of the defendants, the fact that receipts were taken in one stage of the business, intended by neither party as completing their dealing or contract, did not exhaust the authority. It was never so intended and cannot have that effect. The acts of the parties must have operation as they were intended by the parties when they were done. The bills of lading excepted the risk of fire, and as it was by that danger that the property in question was destroyed, the defendants are free from liability, at least unless the loss was due to their negligence or fault. The only suggestion of fault is that the cars

containing these packages were unloaded on Sunday in Chicago. The case does not inform us that by the law of Illinois, where the loss happened, unloading cars on Sunday was unlawful, and we have no means of knowing such to be the fact, in respect to the laws of that state. The common law, at least, teaches no such doctrine.

The judgment should be reversed and a new trial ordered, costs to abide the event.[18]

## LOUISVILLE & N. R. CO. v. MEYER.

**(Supreme Court of Alabama, 1885. 78 Ala. 597.)**

STONE, C. J.[19] * * * The facts of this case are substantially as follows: Meyer, the consignor, delivered the goods to the freight agent of the defendant company, at Cullman, one of its shipping stations. They were directed, or consigned, to Bluffton, in Indiana, and Meyer proposed to prepay freight for the entire route. The agent was not able to tell him the rate, but accepted as a deposit a sufficient sum of money to pay the freight when the rate should be ascertained. He gave him no bill of lading, but filled up one of the printed forms, making it complete except the freight rate; but it was not then delivered to Meyer. The freight agent testified, that "the bill of lading was open before plaintiff at the time [the time it was filled up], and he could have known the contents, if he had desired;" "could not say plaintiff read the paper." Its contents were not explained to him. On the next day, the agent, having learned the rate, inserted it in the bill of lading, which he forwarded, together with the surplus of money, to Meyer, at Bluffton, Ind. The testimony tended to show the box of goods was safely transported to a point beyond the defendant railroad's terminus, and that, if lost, it must have been after it had left defendant's personal custody.

One clause in the bill of lading reads as follows: "It is further stipulated and agreed that in case of any loss, detriment, or damage done to, or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility

[18] Acc. Germania Fire Ins. Co. v. Memphis, etc., Co., 72 N. Y. 90, 20 Am. Rep. 113 (1878); Phœnix Ins. Co. v. Erie Co., 117 U. S. 312, 6 Sup. Ct. 1176, 29 L. Ed. 873 (1886); Ft. Worth Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846 (1900); Pittsburg, etc., Co. v. Barrett, 36 Ohio St. 448 (1881), goods destroyed before bill of lading issued; Curran v. Midland, etc., Co., [1896] 2 Irish, 183, goods destroyed before bill of lading issued.

Where terms of carriage have been agreed, and the carrier has received the goods, the shipper's subsequent acceptance of a bill of lading does not, of itself, bind him to unknown terms which vary the agreement. The Arctic Bird (D. C.) 109 Fed. 167 (1901); Gaines v. Union, etc., Co., 28 Ohio St. 418, 443 (1876). But the fact that a bill of lading was accepted may be evidence that a prior agreement was not intended to be a complete and final contract of carriage. Germania Fire Ins. Co. v. Memphis, etc., Co., 72 N. Y. 90, 28 Am. Rep. 113 (1878).

[19] The statement of facts and part of the opinion are omitted.

shall or may be incurred, that company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage." It is contended that Meyer could and should have read the bill of lading when it was being filled up, and that therefore he must be charged with a knowledge of its terms, and held to have acquiesced in them. On this theory, several charges were asked and refused. We think this position untenable. Possibly, if contemporaneously with the delivery of the goods to the railroad he had received the bill of lading containing such stipulation, he would be conclusively presumed to have read it, and to have acquiesced in it. Goetter v. Pickett, 61 Ala. 387; Dawson v. Burrus, 73 Ala. 111. And this would have been no hardship, for he would then have had it in his power to reject the terms. Failing to read the contract he was accepting, might be fairly interpreted as an expression of full confidence, and an agreement to accept the terms they would offer. That is not this case. The railroad company, through its agent, agreed to accept and did accept the freight, knowing it was consigned to a point beyond its terminus. It agreed to accept, and did accept, payment of freight charges for the entire route. These, without more, bound the railroad company, as a common carrier, to deliver the freight at the point of destination. That liability could have been limited by special contract—stipulated terms acquiesced in by the shipper. There is nothing in this record to show that Meyer was informed of any proposed limitation of the carrier's accustomed liability, nor is anything shown which cast on him the duty of informing himself. The charges asked were properly refused.

Affirmed.[20]

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## THE DELAWARE.

**(Supreme Court of the United States, 1871. 14 Wall. 579, 20 L. Ed. 779.)**

Appeal from the Circuit Court for the District of California, the case being thus:

The Oregon Iron Company, on the 8th day of May, 1868, shipped on board the bark Delaware, then at Portland, Oregon, 76 tons of pig iron, to be carried to San Francisco, at a freight of $4.50 a ton. The bill of lading was in these words:

"Shipped, in good order and condition, by Oregon Iron Company, on board the good bark Delaware, Shillaber, master, now lying in the port of Portland, and bound to San Francisco, to say seventy-five tons pig iron, more or less (contents, quality, and weight unknown), being marked as in the margin, and are to be delivered in like good order and condition at the aforesaid port of San Francisco, at ship's

[20] Acc. Mich. Cent. R. Co. v. Boyd, 91 Ill. 268 (1878); Merchants' Des. Tr. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265 (1893); Ill. Cent. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164 (1899).

tackles (the dangers of the seas, fire, and collision excepted) unto ———, or assigns, he or they paying freight for the said goods in United States gold coin (before delivery, if required) as per margin, with 5 per cent. primage and average accustomed.

"In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Vessel not accountable for breakage, leakage, or rust.

"Portland, May 8th, 1868.

"C. E. Shillaber, for the Captain."

The iron was not delivered at San Francisco; and on a libel filed by the Iron Company, the defense set up was that by a verbal agreement made between the Iron Company and the master of the ship before the shipment or the signing of the bill of lading, the iron was stowed on deck, and that the whole of it, with the exception of 6 tons and 90 pounds, had been jettisoned in a storm.

On the trial, the owners of the vessel offered proof of this parol agreement. The libelants objected, and the court excluded the evidence on the ground that parol proof was inadmissible to vary the bill of lading; and decreed in favor of the libelants for the iron that was thrown overboard. On appeal the case was disposed of in the same way in the Circuit Court. It was now here; the question being, as in the two courts below, whether in a suit upon a bill of lading like the one here, for nondelivery of goods stowed on deck, and jettisoned at sea, it is competent, in the absence of a custom to stow such goods on deck, to prove by parol a verbal agreement for such stowage.

* * *

CLIFFORD, J.[21] * * * Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law. Lawrence et al. v. Minturn, 17 How. 114, 15 L. Ed. 58; The Peytona, 2 Curt. 23, Fed. Cas. No. 11,058.

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not con-

[21] Parts of the statement of facts and of the opinion are omitted.

tribute both to the disaster and to the loss of the goods. Gould v. Oliver, 4 Bing. N. C. 142; Story on Bailment, § 531. * * * Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed. Angell on Carriers, § 212; Redfield on Carriers, §§ 247 to 269; The St. Cloud, Brown & Lushington, Adm. 4.

Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abbott on Shipping (7th Am. Ed.) 323; O'Brien v. Gilchrist, 34 Me. 558, 56 Am. Dec. 676; 1 Parsons on Shipping, 186; Maclachlan on Shipping, 338; Emerigon on Ins. 251. Regularly the goods ought to be on board before the bill of lading is signed; but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel, and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; The Eddy, 5 Wall. 495, 18 L. Ed. 486.

Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Maclachlan on Shipping, 338, 339; Smith's Mercantile Law (6th Ed.) 308. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Bates v. Todd, 1 Moody & Robinson, 106; Berkley v. Watling, 7 Adolphus & Ellis, 29; Wayland v. Mosely, 5 Ala. 430, 39 Am. Dec. 335; Brown v. Byrne, 3 Ellis & Blackburne, 714; Blaikie v. Stembridge, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the

receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. 1 Greenleaf on Evidence (12th Ed.) § 305; Bradley v. Dunipace, 1 Hurlstone & Colt, 525.

Text-writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between carrier and shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad, or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts. Hastings v. Pepper, 11 Pick. (Mass.) 42; Clark v. Barnwell et al., 12 How. 272, 13 L. Ed. 985; Ellis v. Willard, 9 N. Y. 529; Babcock v. May, 4 Ohio, 346; Adams v. Packet Co., 5 C. B. (N. S.) 492; Sack v. Ford, 13 C. B. (N. S.) 100. * * *

Subsequent oral agreements in respect to a prior written agreement, not falling within a statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Emerson v. Slater, 22 How. 41, 16 L. Ed. 360; Gross v. Nugent, 5 Barnewall & Adolphus, 65; Nelson v. Boynton, 3 Metc. (Mass.) 402, 37 Am. Dec. 148; 1 Greenleaf on Evidence, 303; Harvey v. Grabham, 5 Adolphus & Ellis, 61. Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract. Ruse v. Insurance Co., 23 N. Y. 519; Wheelton v. Hardisty, 8 Ellis & Blackburn, 296; 2 Smith's Leading Cases, 758; Angell on Carriers (4th Ed.) § 229.

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs a bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception, of dangers of the seas, unless the dangers

were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment. The Rebecca, Ware, 210; Dodge v. Bartol, 5 Greenl. (Me.) 286, 17 Am. Dec. 233; Wolcott v. Insurance Co., 4 Pick. (Mass.) 429; Taunton Cooper Co. v. Insurance Co., 22 Pick. (Mass.) 108; Adams v. Ins. Co., Id. 163. * * *

Remarks, it must be admitted, are found in the opinion of the court, in the case of Vernard v. Hudson, 3 Sumn. 406, Fed. Cas. No. 16,921, and also in the case of Sayward v. Stevens (1854) 3 Gray (Mass.) 97, which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion as the correct rule of law, subject to the qualifications herein expressed.

Decree affirmed.[22]

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## RODOCANACHI, SONS & CO. v. MILBURN BROS.

(Court of Appeal, 1886. 18 Q. B. Div. 67.)

Action for nondelivery of a cargo of cotton seed shipped on defendants' vessel and lost by the negligence of her master.

Lord ESHER, M. R.[23] In this case the plaintiffs had chartered the defendants' ship, and by the terms of the charter party the captain was to sign a bill of lading for the cargo, which he accordingly did. The terms of the charter party and those of the bill of lading are not identical, there being no exception in the charter party of liability for loss occasioned by the act, neglect, or default of the master or mariners, whereas there is such an exception in the bill of lading.

The plaintiffs contend that they are entitled to sue on the charter party, and to rely on the contract therein expressed; and therefore that they are entitled to recover notwithstanding the exception in the bill of lading. The defendants admit that, if the charter party had stood alone, they could not have disputed their liability; but they say that the charter party contained clauses by which "the master was to sign bill of lading at any rate of freight and as customary at port of lading," and by which the liability of the charterers was to cease when the goods were shipped. Reading those clauses together they say that the proper conclusion is that the liability, which they, as the shipowners, would have incurred under the charter party, if it had stood alone, has been altered by the bill of lading which the plaintiffs must be taken to have presented for signature, and which was accord-

[22] Acc. Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149 (1819); Creery v. Holly, 14 Wend. (N. Y.) 26 (1835); The Wellington, 1 Biss. 279, Fed. Cas. No. 17,384 (1859). And see Carver, Carriage by Sea, § 56; Leduc v. Ward, ante, p. 52, note.

[23] The statement of facts has been rewritten. Parts of the opinion are omitted.

ingly signed, and that the new liability is governed by the bill of lading. * * *

But, assuming that under this clause of the charter party the master was to sign bills of lading in the form customary at the port of lading, and that the form of this bill of lading was such customary form, so that only a bill of lading in this form could be signed in accordance with the charter party, then the result would be that the bill of lading to be signed under the charter party would be one the stipulations of which were in part not the same as those of the charter party. What in that case is the rule as to the construction of the two documents? In my opinion, even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods. With regard to the effect of these documents as between charterers and shipowners, I adopt fully what was said by Lord Bramwell in Sewell v. Burdick, 10 App. Cas. 105. This doctrine gives effect to both instruments, because, although as between the shipowners and the charterers the bill of lading is only a receipt for the goods, it will be the contract upon which the holder of the bill of lading to whom it is indorsed must rely as between himself and the shipowner. * * * On these grounds I think that the defendants' appeal fails. * * *[24]

Judgment accordingly.

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## WEHMANN v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Minnesota, 1894. 58 Minn. 22, 59 N. W. 546.)

Action for the loss of flour shipped by plaintiff over defendant's railroad, to be carried to Gladstone, Wis., and there delivered to a connecting carrier for further transportation. The bill of lading contained an exemption for loss after arrival at the warehouse at Gladstone. The flour was burned without defendant's fault while in warehouse at Gladstone awaiting delivery. The trial judge directed a verdict for plaintiff. Defendant appeals from an order denying a new trial.

[24] Lindley and Lopes, L. JJ., delivered concurring opinions. The latter said: "I believe the law to be that, when there is a charter party, as between charterers and shipowners, the bill of lading operates prima facie as a mere receipt for the goods, and a document of title which may be negotiated, and by which the property is transferred, but does not operate as a new contract, or alter the contract contained in the charter party."

Compare Park v. Preston, 108 N. Y. 434, 15 N. E. 705 (1887), and Donovan v. Standard Oil Co., 155 N. Y. 112, 49 N. E. 678 (1898). See, also, The Arctic Bird (D. C.) 109 Fed. 167 (1901); The Caledonia (C. C.) 43 Fed. 661 (1890); Id., 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644 (1895).

GILFILLAN, C. J.[25] * * * As the flour was not delivered to the transportation company, nor notice of its arrival given to its agent, so that its responsibility as carrier might attach, the responsibility of defendant as carrier had not ended at the time of the fire, unless, by virtue of a clause in the bill of lading in these words: "It being further expressly agreed that this company assumes no liability, and it is not to be held responsible as common carriers, for any loss or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damages thereto, or any delay in transportation or delivery thereof, by any connecting or succeeding carrier."

Conceding that, because this was a shipment for carriage beyond the limits of the state, the statutes of the state do not apply, and that the validity of the clause is to be determined by the principles of the common law, then the question arises, was there a consideration to support it? Such a clause, to be of force, must stand as a contract between the shipper and the carrier, and, as in the case of all contracts, there must be a consideration for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the full common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates. And, where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability.

But in such a case as this, any abatement of rates is forbidden by act of congress, and therefore none can be presumed. The tariff of joint rates in the case makes no mention of any limitation of liability. They are to be taken, therefore, as rates established for carriage with full common carrier's liability; and under the act of congress no abatement could be made to support a contract for a limited liability. The clause is void for want of a consideration to support it. Order affirmed.[26]

[25] The statement of facts has been rewritten, and part of the opinion omitted.

[26] Acc. Selden, J., in Bissell v. N. Y. C. R. Co., 25 N. Y. 442, 449, 82 Am. Dec. 369 (1862), passenger ticket; Railway Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018 (1890); Balt. & O. S. W. Ry. Co. v. Crawford, 65 Ill. App. 113 (1896); Schaller v. Chicago & N. W. Ry. Co., 97 Wis. 31, 71 N. W. 1042 (1897), semble; Richardson v. Chic. & A. R. Co., 149 Mo. 311, 50 S. W. 782 (1899), semble; Ill. Cent. R. Co. v. Lancaster Ins. Co., 79 Miss. 114, 30 South. 43 (1901); Parker v. Atl., etc., R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827 (1903); St. Louis, etc., R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21 (1904); Evansville, etc., R. Co. v. Kevekordes (Ind. App.) 69 N. E. 1022 (1904).

## CAU v. TEXAS & P. RY. CO.

(Supreme Court of the United States, 1904. 194 U. S. 427, 24 Sup. Ct. 668, 48 L. Ed. 1053.)

Action for loss of cotton by fire while in defendant railroad's possession for carriage to New Orleans. The bills of lading excepted loss by fire. The shipper testified that he inquired of the railroad the rate for cotton, knowing that all the railroads had the same rate and knowing that it was against the law for them to give any other rate, and that he shipped the cotton at the rate named, taking bills of lading without knowing that they excepted loss by fire, and without anything said as to shipment at any other rate or on other terms. The court directed a verdict for defendant. Error to review a judgment affirming a judgment entered on the verdict.

McKENNA, J.[27] It is well settled that the carrier may limit his common-law liability. York Mfg. Co. v. Illinois C. R. Co., 3 Wall. 107, 18 L. Ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which, the common-law or limited liability, he will ship his goods."[28]

If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability, without the assent of the shipper (New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (Railroad Co. v. Lockwood, 17 Wall. 357, 21

[27] The statement of facts has been rewritten, and part of the opinion omitted.

[28] "Moreover, though it were conceded that this paper was in fact issued before the transportation of the goods, as a bill of lading therefor, it would nevertheless be invalid in so far as it provides for limited liability. * * * The agent who issued this paper, while testifying before the jury on behalf of the company, said * * * that 'he would not have shipped the fountain for the plaintiff if he had refused to accept a bill of lading in that form, and in the terms of that one.' It is well settled that a common carrier may, by a stipulation in its bill of lading, limit its common-law liability for loss or damage of freight not caused by its own negligence. But this cannot be validly done unless the carrier at the time holds itself in readiness to transport the freight with or without such limitation, and allows the shipper a reasonable and bona fide alternative between the two modes of shipment." Caldwell, J., in Ill. Cent. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164 (1899).

L. Ed. 627 [post, p. 445]; Bank of Kentucky v. Adams, 93 U. S. 174, 23 L. Ed. 872).

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

2. It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in York Mfg. Co. v. Illinois C. R. Co., 3 Wall. 107, 18 L. Ed. 170. In response it was said: "The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads. * * *

Judgment affirmed.[29]

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## MENZELL v. CHICAGO & N. W. RY. CO.

(Circuit Court, D. Iowa, 1870. 1 Dill. 531, Fed. Cas. No. 9,429.)

DILLON, J.[30] * * * On the admitted facts of the case, conceding the validity of the special contract on which the defendant rests, and that it is binding upon the plaintiff, and that the fire was purely

[29] To same effect are Nelson v. Hudson River R. Co., 48 N. Y. 498, 506 (1872); Rubens v. Ludgate Hill S. S. Co., 65 Hun, 625, 20 N. Y. Supp. 481 (1892), affirmed 143 N. Y. 629, 37 N. E. 825 (1894); Arthur v. Texas, etc., R. Co., 139 Fed. 127, 71 C. C. A. 391 (1905), affirmed on this point 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590 (1907); Inman v. Seaboard Air Line (C. C.) 159 Fed. 960, 968 (1908). Many courts, which regard a release of liability as invalid without a special consideration, apply a different rule to other stipulations. Hatch v. Minn., etc., Co., 15 N. D. 490, 107 N. W. 1087 (1906), no right to sue unless notice of claim given before cattle removed; Freeman v. Kansas, etc., Ry. Co., 118 Mo. App. 526, 93 S. W. 302 (1906), notice of damage to be given within five days; 101 Live Stock Co. v. Kansas, etc., Co., 100 Mo. App. 674, 75 S. W. 782 (1903), damages to be based on value at place of shipment.

A release recited to be in consideration of a reduced rate has been held not to bind the shipper, if without his knowledge the recital is false. Ward v. Mo. Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28 (1900); Ficklin v. Wabash R. Co., 117 Mo. App. 221, 93 S. W. 847 (1906). Or if he knows its falsity. McFadden v. Mo. Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721 (1887).

[30] The statement of facts and parts of the opinion are omitted.

accidental, it is still my opinion, as it was on the trial, that the plaintiff is entitled to recover. * * *

The language is, "I hereby release said company from any and all damage that may occur to said goods, arising from leakage or decay, chafing or breakage, or (and this is the language relied on) from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit."

Construing this general and indefinite language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a total loss or destruction of the goods by fire while in the warehouse of the company at an intermediate station on the line of transportation; and therefore this agreement (admitting that it was knowingly entered into by the plaintiff, and founded upon a sufficient consideration) does not relieve the company from liability for the loss of the goods by fire, even though the fire were accidental, and without fault on the part of the company, its agents, or servants.

Judgment on the verdict.[81]

[81] See, also, Serraino v. Campbell, 1 Q. B. 283, 290 (1891).

"It is well settled that exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and that any doubt or ambiguity therein is to be resolved in favor of the shipper. 'And when the particular dangers or risks against which the carrier has specifically guarded himself in his receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences ejusdem generis with those previously enumerated, unless there be a clear intent to the contrary.' Hutch. Carr. §§ 275, 276; Hawkins v. Railway Co., 17 Mich. 57 [97 Am. Dec. 179]; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537 [39 L. Ed. 644]." Taft, J., in N. K. Fairbank & Co. v. Cincinnati, etc., Ry., 81 Fed. 289, 26 C. C. A. 402 (1897), holding damage caused by the breaking of an axle of a freight car not to be within the meaning of the phrase "accidents to boilers or machinery" in a bill of lading for carriage by land but drawn to cover carriage by water also.

An exception in a maritime bill of lading does not relieve the carrier from liability to contribute in general average to a loss of cargo by sacrifice due to the excepted peril. Nimick v. Holmes, 25 Pa. 366, 64 Am. Dec. 710 (1855), fire; Crooks v. Allen, 5 Q. B. D. 38 (1879), "not liable for loss capable of being covered by insurance"; Burton v. English, 12 Q. B. D. 218 (1883), "deck load at merchant's risk"; The Roanoke, 59 Fed. 161, 8 C. C. A. 67 (1893), "not liable for loss arising from, caused by, or connected with fire." An exception of "collision even when caused by negligence of shipowner's servants" does not apply to negligence of the crew of another vessel belonging to the same carrier, which brings her into collision with the carrying ship. The Britannic (D. C.) 39 Fed. 395 (1889). An agreement that the carrier shall not be liable for specified causes of loss not mentioning misdelivery, nor "for any claim whatsoever unless presented within 90 days," does not apply to a claim for conversion by negligent misdelivery. Security Trust Co. v. Wells Fargo & Co., 81 App. Div. 426, 80 N. Y. Supp. 830 (1903), affirmed 178 N. Y. 620, 70 N. E. 1109 (1904). See, further, So. Ry. v. Webb, 143 Ala. 304, 39 South. 282, 111 Am. St. Rep. 45 (1905); Wright v. C., B. & Q. Ry., 118 Mo. App. 392, 94 S. W. 555 (1906); Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527 (1902).

A common carrier, who by bill of lading undertakes to deliver, "dangers of the sea only excepted," does not thereby make himself liable for loss by

## MYNARD v. SYRACUSE, B. & N. Y. R. CO.

(Court of Appeals of New York, 1877. 71 N. Y. 180, 27 Am. Rep. 28.)

CHURCH, C. J.[32] The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising," should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or willful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate

public enemies. Gage v. Tirrell, 9 Allen (Mass.) 299 (1864). So of a private carrier. See U. S. v. Power, 6 Mont. 271, 12 Pac. 639 (1887). For the meaning of "dangers of the sea," see Carver, Carriage by Sea, §§ 84-91.

[32] The statement of facts and parts of the opinion are omitted.

them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this state. * * *

So, in the Steinweg Case, 43 N. Y. 123, 3 Am. Rep. 673, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the Magnin Case, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid."

It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence,[88] Johnson, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that he expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627 [post, p. 445], the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from

[88] Acc. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300 (1875); Bermel v. N. Y., etc., Co., 172 N. Y. 639, 65 N. E. 1113 (1902); Boscowitz v. Adams Ex. Co., 93 Ill. 523, 34 Am. Rep. 191 (1879). And see Black v. Goodrich Trans. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713 (1882). Contra: Pac. Ex. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107 (1891); Calderon v. Atlas S. S. Co., 69 Fed. 574, 16 C. C. A. 332 (1895), reversed on another point 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033 (1898); Michalitschke v. Wells, 118 Cal. 683, 50 Pac. 847 (1897), semble; Ashendon v. London, etc., Ry. Co., L. R. 5 Ex. D. 190 (1880); Baxter's Leather Co. v. Royal Mail Co., [1908] 2 K. B. 626. And see Durgin v. Am. Ex. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453 (1890). But cf. Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575 (1872).

responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the question cannot with propriety be regarded as an open one in this state. Wells v. Steam Nav. Co., 8 N. Y. 375; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125 [ante, p. 407]; Wells v. New York Cent. R. Co., 24 N. Y. 181–196; Bissell v. New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Guillaume v. Hamburgh & American Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; Poucher v. New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Cragin v. New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559.

The remedy is with the Legislature, if remedy is needed. But, upon the question involved here, it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uniform course of decisions in this and most of the other states, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication. * * *

The only authority seeming to favor the position of the respondent is in Cragin v. N. Y. C. R. R. Co. (1872) 51 N. Y. 61, 10 Am. Rep. 559. The loss of the hogs in that case was caused by heat, and the negligence attributed was in not cooling them off with water.[84]

[84] In that case a shipper of hogs undertook the risk of injury "in consequence of heat, suffocation, or other ill effects of being crowded." Earl, C. J., said: "If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing; for in such case, without the stipulation, it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat."

For a like reason it has been held that a general exemption in a passenger ticket is intended to apply to bodily injury caused by the carrier's negligence. McCawley v. Furness Ry. Co., L. R. 8 Q. B. 57 (1872), "at own risk"; Meuer v. Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898 (1894), "personal injury from whatever cause." See, also, Bissell v. N. Y. C. R. Co., 25 N. Y. 442, 82 Am. Dec. 369 (1862); Hosmer v. Old Col. R. Co., 156 Mass. 506, 31 N. E. 652 (1892); Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187 (1905). Contra: Long v. Lehigh Valley R. Co., 130 Fed. 870, 65 C. C. A. 354 (1904), semble.

We do not think, under the peculiar stipulation, and the character of the property in that case, that it is in conflict with the views before expressed.

The judgment of the General Term must be reversed, and that of the County Court affirmed.[35]

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## LAMB v. CAMDEN & A. R. & TRANSP. CO.

**(Court of Appeals of New York, 1871. 46 N. Y. 271, 7 Am. Rep. 327.)**

Appeal from judgment of the General Term of the New York Common Pleas, affirming a judgment entered upon a verdict in favor of plaintiff, and also, affirming order denying motion for new trial.

The action is brought against defendant as a common carrier, to recover damages for the non-delivery of a quantity of cotton. * * *

GROVER, J.[36] * * * It was proved by the defendant that the cotton in question was destroyed by fire while in a shed upon the dock of the defendant, where it had been placed by the defendant. The question was made upon the trial whether this proof, of itself, constituted a defense to the action, or whether the defendant was bound to go further, and show that it and its employés were free from all negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiff, to maintain the action, to prove that the

[35] Acc. Phillips v. Clark, 2 C. B. (N. S.) 156 (1857), "not accountable for leakage or breakage"; Compania La Flecha v. Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398 (1897), "at owner's risk"; Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44 (1900); "liability under this bill of lading shall be based on value at place of shipment"; Price v. Union, etc., Co., [1904] 1 K. B. 412, "loss which can be covered by insurance."

An exception of loss by "thieves of whatever kind, whether on board or not," or caused by neglect or error in judgment of persons in the shipowner's employ, does not apply to theft by men of the stevedore employed by the carrier to load the ship. Steinman v. Angier Line, [1891] 1 Q. B. 619.

An exception in a maritime bill of lading will, unless a contrary intent clearly appears, be construed as not intended to relieve the carrier from liability for the unseaworthiness of his ship. Steel v. State Line S. S. Co., L. R. 3 App. Cas. 72 (1877), "perils of the seas of whatever nature or kind soever and howsoever caused" held inapplicable where the sea burst through a porthole owing to neglect of the crew in leaving it without sufficient fastening at the beginning of the voyage; The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181 (1898), "latent defects in hull" held inapplicable to a defect existing when the voyage began; Thin v. Richards, [1892] 2 Q. B. 141, "any act, neglect, or default whatever * * * in the navigation or management of the ship" held inapplicable to loss due to the engineer's failure to take on coal enough at a port of call.

In Carr v. Lancashire, etc., Ry. Co., [1852] 7 Ex. 707 (approved per Blackburn and Crompton, JJ., in Peek v. No. Staffordshire Ry. Co., 10 H. L. C. 473, 504, 505, 529 [1863]), the words "subject to owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (howsoever caused)," were held to relieve the carrier for loss by gross negligence. Parke, B., said: "It is not for us to fritter away the true sense and meaning of these contracts, merely with a view to make men careful."

[36] Parts of the statement of facts and of the opinion are omitted.

fire causing the loss resulted from such negligence; in other words, whether the plaintiff was bound to prove that the fire causing the loss resulted from the negligence of the defendant, or the latter was in the first instance, bound to prove itself free from all negligence in that respect. In considering this question, it must be borne in mind that it has already been determined that the defendant was exonerated from all liability as carrier for a loss caused by the destruction of the cotton by fire by an express provision of the contract in pursuance of which it transported the cotton. Relieved of this responsibility, it was liable only, in case it was so destroyed, as bailee for hire; and it is undisputed that such a bailee is liable for the loss of the property only in cases where the loss is the result of his negligence.

The question is whether, in case of loss by a bailee for hire, the bailor can recover upon simple proof of loss, unless the bailee shall prove that he was free from all negligence contributing to such loss, or whether the bailor must go further, and prove that the loss was caused by the negligence of the bailee. I believe this to be a fair statement of the question between the parties to the present action; and yet, so stated, no one will hardly insist that the bailor can recover without affirmatively proving that the loss was caused by the negligence of the bailee. The decisions are numerous to this effect, based upon the familiar principle that negligence, being a wrong, will not be presumed, but must be proved by the party charging it and seeking a recovery founded thereon. I shall cite a few only. Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Newton v. Pope, 1 Cow. 109; Schmidt v. Blood, 9 Wend. 268, 24 Am. Dec. 143; French v. Buff., etc., R. R. (decided by the Court of Appeals) 43* N. Y. 108.

Some of these were cases of loss by carriers, proved to have been from causes for which they were not liable as carriers; others where the loss was by other bailees. To these might be added other cases in the Supreme Court of the United States, in the courts of this and other states, and in England; but it is unnecessary. Cases may occur where the proof of the loss and circumstances connected therewith may show a case of presumptive negligence in the defendant, such as will entitle the plaintiff to recover upon that ground, in the absence of further proof. To illustrate: A passenger upon a railroad, receiving an injury caused by the cars running off the track, may rely upon the fact that they did run off as evidence of negligence; nevertheless, the onus is upon him of establishing to the satisfaction of the jury that his injury was caused by the negligence of the defendant, and, unless he satisfies the jury, affirmatively, of this fact from all the evidence, he is not entitled to recover. Curtis v. Rochester, etc., Railroad, 18 N. Y. 534, 75 Am. Dec. 258.

It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which, uncontradicted, proves the fact alleged by

him. It has, in such cases, frequently been said that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this, and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury, affirmatively, of the truth of the fact alleged by him or he is not entitled to a verdict. In the present case, to entitle the plaintiff to recover, he was bound to prove that the fire which consumed the cotton resulted from the negligence of the defendant.

The remaining inquiry is whether the rule requiring this was violated upon the trial, from which the defendant might have been prejudiced, after proof had been given by the defendant showing the destruction of the cotton by fire. Its counsel proposed to rest his case, reserving the right to rebut any testimony that might be adduced by the plaintiff, tending to show that the destruction of the cotton by fire was occasioned through the defendant's negligence or default. The plaintiff's counsel insisted that the defendant was bound to prove that it had not been guilty of negligence, and that the defendant's case must then be exhausted. The court thereupon decided that the burden of proof was on the defendant to show that the destruction of the cotton by fire was not caused by negligence on its part. This was error. Although, in proving the destruction of the cotton by fire, it appeared that the fire originated on a boat of the defendant laying at its dock, this was only evidence tending to show negligence of the defendant. Whether sufficient prima facie to entitle the plaintiff to a verdict is a question not necessary to decide, as no ruling thereon was made by the court.

Be that as it may, the burden was still upon the plaintiff to establish, to the satisfaction of the jury from all the evidence, that the fire was the result of the negligence of the defendant. Other evidence was given, making the question of the defendant's negligence, in respect to the fire, proper to be decided by the jury. The court, among other things, charged the jury that, although the defendant had been freed from its ordinary measure of responsibility as insurer, it is not relieved from the burden of satisfying you that this loss, which it is beyond doubt happened by fire, was not occasioned by negligence on its part. To this the defendant's counsel excepted. In another part of the charge the judge stated that the real importance of the question as to reasonable time (meaning for the removal of the cotton by plaintiff), consists in this case of the fact that, down to this point of time, the burden of establishing that there was not any such negligence as I have stated rests upon the defendant. This part of the charge was excepted to. Both exceptions were well taken. The idea plainly conveyed to the jury was that they should find for the plaintiff, unless satisfied from the evidence that the fire was not the result of the defendant's negligence, thus leaving them to find for the plaintiff,

if unable to determine whether the fire so resulted or not, while the instruction should have been to find for the defendant, unless they found, from all the evidence, that the fire was the result of the negligence of the defendant. * * *

Judgment reversed.[37]

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## RYAN v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Texas, 1886. 65 Tex. 13, 57 Am. Rep. 589.)

Appeal from Grayson.

This suit was instituted in the district court of Grayson county to recover from the defendant the value of certain goods, wares and merchandise which defendant, in St. Louis, Mo., agreed and contracted to deliver in Honey Grove, Tex., and which were not delivered. The bill of lading had a printed head, in which was stipulated certain exceptions from liability, among others, that of destruction by fire. The goods were shipped by A. F. Shapleigh & Co., from

[37] Acc. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160 (1870). In The Glendarroch, [1894] P. D. 226, 231, Lord Esher said: "When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew.' You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, 'Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner.' That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the nondelivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception—within its ordinary meaning.' That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception. In my opinion, you find in all the books, down to the most modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and, relying on the first and substantive part of the bill of lading, alleged nondelivery. Strictly speaking, the declaration could not properly have stated anything about negligence, because negligence was immaterial. The plea followed the terms of the exception construed in their ordinary sense—that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it shows that it was no part of the proof which the defendant was bound to give. Then you have a long succession of cases, all setting out a replication, and that replication in the given case is: 'Yes, it is true there was a loss by perils of the sea within the prima facie exception; but that was brought about by the negligence of your servants—i. e., by your captain and crew.' The plaintiff could not depart from his declaration; but he could support it by showing that the exception was not satisfied, because there had been negligence."

whom they had been purchased by plaintiff, and were destroyed by fire while in defendant's possession. The cause was submitted to the court and decided in favor of defendant.

WILLIE, C. J.[38] * * * The question is, the railroad company being liable if the goods were destroyed by fire through its negligence, was it necessary for the appellants to make on their part any proof upon this subject, or did it devolve upon the company to show that the fire did not occur through its negligence or want of proper care?

This question as to the burden of proof, when a carrier is sought to be made liable for the nondelivery of goods under a special contract like the present, has elicited a contrariety of opinion from the courts of the American Union. Law writers have also been somewhat divided in announcing the principle to be derived from these decisions. It has never been passed upon by this court, and we feel authorized to adopt that view which seems to be the best supported by principle, regardless of the preponderance of authority upon the subject.

It is said that the rule requiring the plaintiff, after the carrier has shown that the goods were destroyed by fire or other excepted cause, to prove that it occurred through the negligence of the carrier, rests upon the principle that he who avers negligence must prove it. Under an ordinary bill of lading, with no special exceptions, if the goods are lost by the act of God, such as a peril of the sea, the burden is upon the carrier to show that his negligence did not contribute to bring about the accident.[39] Story on Bailm. § 529; Shaw v. Gardner, 12 Gray (Mass.) 488; Humphreys v. Reed, 6 Whart. (Pa.) 435.

Yet the plaintiff asserts negligence in the one case no more than in the other. A carrier by water is as much bound to protect his cargo from fire, though that be within the exceptions of his contract, as he is to construct and manage his vessel and stow his cargo so as to avoid, as much as possible, the dangers of the seas. We cannot see then why he should not account for the manner of the loss, and the causes which brought it about as much in the one case as in the other.

In a suit of this character, it is sufficient for the plaintiff to aver and prove that the goods were delivered to the carrier, and that they have not been received at their point of destination. This is said to make a prima facie case of negligence, which the carrier must rebut or the plaintiff will recover. He may rebut it only in one way, and that is by showing that the goods were lost by one of the exceptions known to the common law, or one of the special exceptions reserved in his contract with the shipper. If by neither a common-law exception nor one specially reserved he is exonerated, he must show that the loss happened without negligence on his part. Take, for in-

[38] Parts of the opinion have been omitted.

[39] See Carriers, 9 Cent. Dig. §§ 578, 579, 4 Dec. Dig. § 132.

stance, the exception of loss by fire. The contract recites merely that if the loss occurs by fire the carrier should not be liable, but the law incorporates the written words "without negligence on the part of the carrier." What the law inserts is as much a part of the contract as what is expressly written in it. When, therefore, the plaintiff makes out a prima facie case of negligence, by proving that the goods were not delivered, is this case rebutted by proof that they were not delivered by reason of a fact which may have existed, and the carrier still have been negligent? If so, he can stop with the presumption of negligence arising from nondelivery still resting upon him, and call upon his adversary to further strengthen his own prima facie case, or it shall lose this character altogether. This would be against all the rules of evidence.

There is another important rule which furnishes additional reasons why the burden of proof to show diligence should be upon the carrier, which is that the burden of proof is on him who best knows the facts. Baker v. Brinson, 9 Rich. Law (S. C.) 201, 67 Am. Dec. 548; Berry v. Cooper, 28 Ga. 543; 1 Greenl. Ev. 79. Here the fire occurred at night, whilst the goods were in transit, and in care of the appellant's employés. Who was most likely to know the facts which brought about the fire, or prevented the goods from being saved from the flames—the plaintiff, who was absent, or the employés of the company, who were present? These latter alone could tell whether improper storage, defective machinery, or negligent use of lights, or other similar cause set the goods on fire. Whilst they would have been competent witnesses for the plaintiff, they were not under their control, but under command of the defendant, and it is the party presumed to know where these employés are to be found. If the rule is that the company must furnish evidence of the circumstances attending the fire so as to clear itself of the charge of negligence, it can and will be produced whenever their testimony is favorable. If it is to the contrary, the witnesses may not be forthcoming. It is a salutary rule which presumes the existence of a fact against a party who has the means of disproving it in his power and fails to make use of them. * * *

A fire would not ordinarily destroy goods upon a train as this did without some negligence on the part of the carrier. The presumptions all being against the appellant, upon the question of negligence, and the proof of care, if it existed, lying wholly in his power, we think, in the absence of evidence on its part to show proper care and diligence, it must be held that the goods were not delivered, but consumed through the negligence of the appellant, and the judgment must accordingly be reversed and the cause remanded, and it is so ordered.

Reversed and remanded.[40]

[40] For the conflicting decisions on this subject, see Carriers, 9 Cent. Dig. § 725, 4 Dec. Dig. § 163; 6 Cyc. 521.

## NEW YORK CENT. R. CO. v. LOCKWOOD.

(Supreme Court of the United States, 1873. 17 Wall. 357, 21 L. Ed. 627.)

Error to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates.

It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error. * * *

Mr. Justice BRADLEY delivered the opinion of the court.[41]

It may be assumed in limine, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage. * * *

It is strenuously insisted * * * that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as

[41] Parts of the opinion have been omitted.

well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. * * *

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. * * *

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and

diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr v. New Jersey Steam Navigation Company [ante, p. 407, at p. 410], the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay

tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void.

Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws,

had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant,

who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." * * *

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.[42]

[42] The doctrine of Railroad Co. v. Lockwood prevails generally in the United States. It now prevails in Illinois. Ill. Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253 (1898); Balt. & O. S. W. Ry. Co. v. Fox, 113 Ill. App. 180 (1904). A contrary doctrine prevails in New York and in England. Wilson v. N. Y. C. R. Co., 97 N. Y. 87 (1884); Hodge v. Rutland R. Co., 112 App. Div. 142, 97 N. Y. Supp. 1107 (1906); Blackburn, J., in Peek v. No. Staffordshire Ry. Co., 10 H. L. Cas. 473, 494–507, 511, 512 (1863); In re Mo. S. S. Co., 42 Ch. D. 321 (1889).

For legislation by Congress in regard to contract exemption of carriers for negligence, see the Harter Act of 1893 (27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), interpreted in Calderon v. Atlas S. S. Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033 (1898), and Knott v. Botany Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90 (1900), and section 20 of the Hepburn Act of 1906 (34 Stat. 584, 595 [U. S. Comp. St. Supp. 1909, p. 1164]), "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

CONFLICT OF LAWS.—In The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190 (1902), a common carrier, incorporated under the laws of New Jersey, was held liable for injury to baggage which occurred on the high seas in course of a voyage from Belgium to New York because of negligent stowage in Belgium. The carrier defended upon the ground that the contract of carriage contained an exemption from liability for neglect of servants, valid by the law of Belgium, and provided that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made." White, J., said: "The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires

## NORTHERN PAC. RY. CO. v. ADAMS.

(Supreme Court of the United States, 1904. 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513.)

Action under a statute of Idaho which gave to heirs of persons killed by the wrongful act or neglect of another a right to recover damages. The deceased was killed by falling from a train in motion while passing from one car to another. Further facts are stated in the opinion. Plaintiffs had a verdict and judgment. Certiorari.

BREWER, J.[48] * * * The company is not under two different measures of obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. * * *

The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either willfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts, and been answered in different and opposing ways. We shall not attempt to review the cases in state courts. * * *

the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."

Contra: O'Regan v. Cunard Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484 (1894). Compare Pittsburg, etc., Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732 (1897); Hughes v. Pa. Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713 (1902); Cleveland, etc., Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. 275 (1904). See note in 63 L. R. A. 513.

[48] The statement of facts has been rewritten and parts of the opinion omitted.

In Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employés. Voigt, entering into the employ of the express company, signed a contract in writing, whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employés.

Mr. Justice Shiras, who delivered the opinion of the court, reviewed many state decisions, and concluded with these words (176 U. S. 520, 20 Sup. Ct. 393, 44 L. Ed. 570): "Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of Railroad Co. v. Lockwood [ante, p. 445]; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy." [44]

[44] Shiras, J., also said: "It was well said by Sir George Jessel, M. R., in Printing & N. Registering Co. v. Sampson, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.' * * * The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employé than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employé of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants."

In Chicago, etc., Ry. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187 (1905), a contract was held valid which exempted a railroad from liability for negligent injury by its servants to a Pullman porter. Cartwright, C. J., said: "The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier, but the Pullman Company furnishes special facilities and

In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error, in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court, with instructions to set aside the verdict and grant a new trial.[45]

services to passengers, and the defendant is not a common carrier of Pullman cars and employés performing duties therein."

Acc. Denver, etc., R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432 (1907), with note collecting cases; Griswold v. N. Y., etc., R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115 (1885), newsboy; Hosmer v. Old Col. R. Co., 156 Mass. 506, 31 N. E. 652 (1892), passenger allowed to ride in baggage car; Cleveland, etc., R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908), contract to haul circus. See cases ante, p. 335, note. See, also, Mann v. Pere Marquette R. Co., 135 Mich. 210, 97 N. W. 721 (1903), siding to lumber yard built under release of liability for fire caused by negligence in using it.

[45] Harlan and McKenna, JJ., dissented. For cases accord and contra, see Carriers, 9 Cent. Dig. § 1253, 4 Dec. Dig. § 307 (2). Compare Starr v. Gt. No. Ry. Co., 67 Minn. 18, 69 N. W. 632 (1896), failure to stop train as required by statute; Chicago, etc., Co. v. Lee, 92 Fed. 318, 34 C. C. A. 365 (1899), infant passenger.

In Kinney v. Central R. Co., 32 N. J. Law, 407, 90 Am. Dec. 675 (1868), Beasley, C. J., said: "The transaction is virtually this: The carrier says to the passenger: I have employed careful and skillful men to manage my locomotive and cars; but they are human, and they may fail in their duty, to your danger. The passenger says: In consideration of a free passage, I will run that risk. The bargain is struck on these grounds, and I am clear that it would be a great refinement to impeach it as being prejudicial to public interests. Nor do I find such a contract in any respect incompatible with legal principles on analogous subjects. Agreements of fire insurance are familiar instances much in point, for they are, in general, stipulations for indemnification against the results of a party's own negligence or that of his employés."

## HART v. PENNSYLVANIA R. CO.

(Supreme Court of the United States, 1884. 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.)

This was an action by a shipper against a common carrier for breach of a contract to transport five horses from Jersey City to St. Louis. The action was begun in a state court in Missouri and removed before trial to a federal court. At the trial the plaintiff proved the bill of lading under which the horses were carried, gave evidence that by the negligence of the defendant one of the horses was killed and the others injured, and offered to show that the value of the horse killed was $15,000, and that the other horses, worth from $3,000 to $3,500 each, were rendered of little value. The evidence of value was excluded, upon the ground that under the bill of lading recovery was limited to $200 for each horse or $1,200 for the car load, and the jury under direction of the court found a verdict for the plaintiff for $1,200. The bill of lading was signed by the shipper. Its relevant provisions were as follows:

"Limited Liability Live Stock Contract for United Railroads of New Jersey Division (No. 206).

"Jersey City Station, P. R. R., ———, 187—.

"Lawrence Hart delivered into safe and suitable cars of the Pennsylvania Railroad Company, numbered M. L. 224, for transportation from Jersey City to St. Louis, Mo., live stock, of the kind as follows: One (1) car, five horses, shipper's count; which has been received by said company, for themselves and on behalf of connecting carriers, for transportation, upon the following terms and conditions, which are admitted and accepted by me as just and reasonable:

"First. To pay the freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds (company's weight) and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each; if fat hogs or fat calves, not exceeding fifteen dollars each; if sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each; if a chartered car, on the stock and contents in same, twelve hundred dollars for the car load. But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, and smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom."

Plaintiff sued out a writ of error.

BLATCHFORD, J.[46] * * * It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. * * * It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation.

Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live stock contract," and is confined to live stock. Although the horses, being race horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed, was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight.

It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further. We are, therefore, brought back to the main question. * * *

As a general rule, and in the absence of fraud or imposition, a

[46] The statement of facts has been rewritten, and parts of the opinion omitted.

common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent, Comm. 603, and cases cited; Relf v. Rapp, 3 Watts & S. (Pa.) 21, 37 Am. Dec. 528; Dunlap v. Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy.[47] On the

[47] "Why this reasoning as to a compulsory contract, contained in a printed bill of lading, should be applicable to a limitation, and not applicable to an exemption, from liability, it would puzzle the most ingenious mind to conjecture. If the carrier and the shipper stand upon equal terms, and can make a contract to restrict the liability of the former to the lowest limit of value, without any regard whatever to actual valuation, why cannot the same contracting parties make a contract for absolute exemption? In point of fact, to limit is to exempt pro tanto. When a printed valuation, as in this case, is set upon all horses shipped, without any regard for actual value, and the horse is killed by the negligence of the carrier, does not the carrier, by reason of

contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. This principle is not a new one. In Gibbon v. Paynton, 4 Burr. 2298, the sum of £100 was hidden in some hay in an old nail bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defense was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive, runs the risk of the goods and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought, in reason and justice, to have a greater reward." To the same effect is Batson v. Donovan, 4 Barn. & Ald. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated, in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation. The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger v. Howard, 6 Phila. 174; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Oppenheimer v. U. S. Exp. Co. [ante, p. 400]; Magnin v. Dinsmore, 56 N. Y. 168, and Id., 62 N. Y. 35, 20 Am. Rep. 442, and Id., 70 N. Y. 410, 26 Am. Rep. 608; Earnest v. Express Co., 1 Woods, 573, Fed. Cas. No. 4,248; Elkins v. Empire Transportation Co., *81 Pa. 315; South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 [post, p. 465, note 53]; Same v. Same, 56 Ala. 368; Muser v. Holland, 17 Blatchf. 412, 1 Fed. 382; Harvey v. Terre Haute R. Co., 74 Mo. 538; and Graves v. Lake Shore Ry. Co., 137 Mass. 33, 50 Am. Rep. 582. The contrary rule is sustained in Southern Exp. Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Ben. 271, Fed. Cas. No. 2,761; U. S. Exp. Co. v. Backman,

this so-called contract, exempt himself from liability so far as the true value of the horse may prove to be above the artificial printed valuation of the bill of lading, which is fixed by the company, and to which the shipper must submit or not ship at all?" Lucas, J., dissenting, in Zouch v. Chesapeake & O. Ry. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116 (1892).

28 Ohio St. 144; Black v. Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Kansas City R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; and Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions.

Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute. * * * The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire v. New York Cent. R. Co. 98 Mass. 239, 245, 93 Am. Dec. 162, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is affirmed.[48]

[48] "We know of no rule of law, and no settled public policy, which forbids a shipper from settling by contract what shall be the measure of damages he may be entitled to claim in case of loss of the article shipped. What is the value of a given article is a pure question of evidence, with which the law has nothing to do; and we see no reason why parties may not, by special contract, agree to dispense with the necessity for offering testimony as to the value of such article, just as they may, by agreement or admission, dispense with the necessity for offering testimony as to any other fact material to a controversy." McIver, J., in Johnstone v. Richmond, etc., R. Co., 39 S. C. 56, 17 S. E. 512 (1893). Acc. Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, 4 South. 29 (1887); Ga. So. Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 907 (1904).

"If public policy forbids enforcement of a contract of exemption, when loss is occasioned by negligence it logically requires full, not partial, measure of compensation to the owner of goods so lost or destroyed. It seems to us a common carrier cannot be injured or unfairly dealt with if simply required in the usual course of business to deliver the goods at the place of destination, or account to the shipper for their full value in case he, in violation of his contract, and by his own negligence or that of his servants, has lost or destroyed them; for if the goods are of high value, or the owner or bailor shall fix a high value upon them, it is always competent for the carrier or bailee to use care and expense, and then demand compensation for their carriage proportional to such value." Lewis, J., in Baughman v. Louisville, etc., R. Co., 94 Ky. 150, 21 S. W. 757 (1893). Acc. Weiller v. Pa. R. Co., 134 Pa. 310, 19 Atl. 702, 19 Am. St. Rep. 700 (1890); Cincinnati, etc., Co.'s Receiver v. Graves, 52 S. W. 961, 21 Ky. Law Rep. 684 (1899).

In So. Ry. Co. v. Jones, 132 Ala. 437, 31 South. 501 (1902), McClellan, C. J., speaking of an agreement limiting liability to $100, said: "The question is

## O'MALLEY v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, 1902. 86 Minn. 380, 90 N. W. 974.)

BROWN, J. Action to recover the value of a horse whose death is alleged to have been caused by the negligence of defendant in transporting the same, with other horses, over its line of railway. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial.

The facts are as follows: Plaintiff delivered to defendant a car load of 20 horses to be transported from Morris, this state, to Foxboro, in the state of Wisconsin. Before reaching the destination, one of the horses was killed, by reason, as plaintiff alleges, of the negligent manner in which the car containing the horses was managed by the servants of defendant. The shipment of the horses was under the terms of a bill of lading or shipping contract in which appears the following stipulation, among others, namely: "This agreement, made and entered into the day above stated between the Great Northern Railway Company of the first part, and Tom O'Malley of the second part, witnesseth: That the said railway company has received from said second party one car load of horses, to be transported from Morris, Minn., station to Foxboro station, at the published tariff rate, the same being a reduced rate, given subject to the regulations printed at the heading of this agreement, and upon the terms and conditions following, which are admitted and accepted by the undersigned shippers as just and reasonable; that is to say, * * *. And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums: Each horse, fifty dollars. Such valuation being that whereon the rate of compensation to the railway company for its services and risk connected with said property is based. The party of the first part does hereby declare that this contract was made and entered into by it relying upon the declaration of the party of the second part that the valuations above given are the just and true values of such live stock, and the party of the second part agrees and declares that such valuations are the just and true values of such live stock, and understands and agrees that the party of the first part entered into the contract

not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil, or knew their act was hurtful, to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good that he should be allowed to make such stipulations under any circumstances. * * *"

See, also, So. Ex. Co. v. Owens, 146 Ala. 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41 (1906), and cases cited 21 Harv. Law Rev. 41, note 1.

relying that such values so given are the just and true values of such live stock." The action was brought to recover the sum of $125 as the value of the horse, and the defense was: (1) That defendant was not guilty of negligence; (2) that plaintiff's negligence in respect to the manner of loading and caring for the horses during transportation was the cause of the death of the horse in question; and (3) that plaintiff is limited in the amount of his recovery, if entitled to recover at all, to the sum stipulated in the contract as the value of the horse, viz., $50.

It is the generally accepted doctrine of the courts that a common carrier may, by express contract, limit his common-law liability; and contracts entered into for that purpose, when not intended solely as an exemption from negligence of the carrier or his servants, and when otherwise just and reasonable, are very generally sustained. Ray, Neg. Imp. Duties, 34 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 288. If, however, the purpose of such contracts be merely to place a limit on the amount for which the carrier shall be liable, then as to losses resulting from his negligence such limitation is not deemed just or reasonable, and is not binding; but, on the other hand, if the limitation as to the value of the property be fairly and honestly made as the basis of the carrier's charges and responsibility, it is upheld as a just and reasonable mode of securing a due proportion between what the carrier may be responsible for and the compensation he receives, and to protect himself from extravagant and fanciful valuations, whether subsequent loss occurs through the carrier's negligence or not. The law on this subject is very clearly stated in Alair v. Railway Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588.

The contract involved in the case at bar is very explicit, and clearly comes within the rule laid down in that case. It was prepared by the agent of defendant, and presented to plaintiff for his signature. He signed it, and the agent delivered to him the original, or a duplicate, which he retained. It is claimed from this that plaintiff is conclusively presumed to have assented to the terms and provisions of the contract, and is bound thereby. The cases sustaining contracts of this kind as valid and binding upon the shipper all hold that the contract in respect to limitations as to the value of the property must appear to have been fairly entered into, and as a basis for the carrier's charges and responsibility; and where the shipper shows by competent evidence to the contrary that he was not aware of the provisions of the contract in that respect, and that the contract was not fairly made, and for the purpose of furnishing a basis for the carrier's charges and responsibility, he is not bound thereby. Rosenfeld v. Railway Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Coupland v. Railway Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Railway Co. v. Simpson, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; Railway Co. v. Clark, 48 Kan. 321, 329, 29 Pac. 312. The construction of contracts of this kind, the nature and extent of the obligations

created thereby, and what the parties intended by the language employed, must, when clear and unambiguous, be determined from the writing itself; and extrinsic evidence is inadmissible to contradict or vary the same.

But the question in the case at bar is not what the contract may be construed to be by its language, for there is, and can be, no controversy on that subject. The language is clear and free from doubt, and brings the case fairly within the class of contracts the courts sustain. The question involved is, was the contract, as executed and signed by plaintiff, as respects the limitation placed on the value of the horses, assented to by him? Was the limitation placed therein fairly and in good faith, and was the value so purported to have been agreed upon by the parties intended as a basis for determining the freight charges and defendant's responsibility? In determining this question we are not controlled by the language of the contract; and, though it is clear and unambiguous, and prima facie what it purports to be, the question whether it was made and entered into understandingly and in good faith for the purposes stated, and so as to constitute a contract at all, must be determined from the facts and circumstances surrounding its execution. For the purpose of showing that plaintiff did not assent or agree to the terms of the contract, extrinsic evidence was admissible, not to contradict or vary its express terms, but to show whether it was fairly and honestly entered into in respect to this particular subject. Boorman v. Express Co., 21 Wis. 152; King v. Woodbridge, 34 Vt. 565; Madan v. Sherard [ante, p. 415]; Black v. Railway Co., 111 Ill. 352, 53 Am. Rep. 628; Transportation Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Despatch Co. v. Leysor, 89 Ill. 43; Field v. Railway Co., 71 Ill. 458; Boscowitz v. Express Co., 93 Ill. 523, 34 Am. Rep. 191.

The learned trial court submitted the case to the jury on this theory of the law, and they found that the stipulation as to the value of the property was not included in the contract as a fair valuation fixed by agreement of the parties as a basis for freight charges, and returned a verdict for plaintiff for the sum claimed in the complaint, namely, $125. Whether the evidence was sufficient to sustain the verdict of the jury is the serious question in the case. Perhaps a strong case for plaintiff was not made out, but the evidence fairly and reasonably tends to support the verdict of the jury, and is not so clearly and palpably against it as to justify interference by this court. Plaintiff had loaded his horses into the car, and they were ready for shipment, before the contract was presented to him for his signature. A short time before the departure of the train—about 10 o'clock at night—plaintiff paid defendant's agent the freight charges, whereupon the agent presented him the contract in question, which he signed without reading or knowing its contents. There were no previous negotiations between the parties in reference to what the contract should contain. No inquiry was made of plaintiff as to the value of the

horses, and no representations were made by him in respect thereto. He was not informed that it was necessary that the company know the value in order to enable it to determine the rate of freight to be charged for the transportation of the horses; and it affirmatively appears that their value was inserted in the contract by the agent himself, of his own motion, without consultation with plaintiff, and in accordance with his own estimate of the value of horses in general. There is no claim that the freight charges for shipment were in any way based upon this valuation, nor that charges would have been any higher had the value been greater. We are of opinion that the evidence made a case for the jury. Railway Co. v. Brady, 32 Md. 333. See, also, cases cited supra. The precise question here presented was not involved in Hutchinson v. Railway Co., 37 Minn. 524, 35 N. W. 433.

We have examined the evidence upon the other questions in the case—whether defendant was chargeable with actionable negligence, and whether plaintiff's negligence contributed to cause the injury complained of—and conclude that the questions were properly submitted to the jury, and their verdict must be sustained.

Order affirmed.[49]

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## CENTRAL OF GEORGIA RY. CO. v. HALL.

(Supreme Court of Georgia, 1905. 124 Ga. 322, 52 S. E. 679, 4 L. R. A. [N. S.] 898, 110 Am. St. Rep. 170.)

LUMPKIN, J.[50] * * * 4. It was contended that under the contract the defendant was not liable for the value of the horse beyond the sum of $125. Was the contract relied on by the defendant an actual bona fide agreement as to the value of the property lost, or was it a mere general limitation as to value, amounting to an arbitrary preadjustment of damages? The former would be valid; the latter not. Central Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Georgia R. Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; Georgia Southern Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. The contract, which was included in the bill of

[49] Contra: Johnstone v. Richmond, etc., R. Co., 39 S. C. 56, 17 S. E. 512 (1892). In this case McIver, J., said: "We do not understand that it is contended that the shipper was induced to sign the contract by any misrepresentation on the part of the carrier or his agent, for there is not a particle of evidence to sustain such a contention. But the ground seems to be that the agent of the carrier did not have the contract ready for the shipper's signature until he went to the office to get his ticket to enable him to leave on the passenger train, when he signed the contract hurriedly, and without reading it. We do not think that this was sufficient to excuse noncompliance with the terms of the contract. The shipper was not obliged to sign the contract without reading it, and if he saw fit to do so he must take the consequences."

[50] The statement of facts and parts of the opinion are omitted.

affreightment and signed by the agent of the owner and the agent of the company, contained the following provision: "And it is further agreed that should any damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, $200, for a horse or mule, $125, cattle $40, other animals, $20." This was upon a printed blank containing these amounts already prepared. It did not purport to put a valuation upon the particular horse or horses shipped, but limited the amount to be claimed for any horse, regardless of its real or estimated value, to $125. It had a prearranged amount to which its liability should be limited as to various animals.

If this could be treated as a bona fide estimate or valuation as to the horse which was killed, it might equally be said to be a valuation of every possible horse which might be shipped, before it was ever seen or heard of by the company's agent.[51] The expression "other animals $20" would thus be treated as being a bona fide valuation of any other animal, regardless of what was its nature, character, or actual value. A rabbit, a hog, or an elephant might equally fall under the designation of "other animals," and the arbitrary limitation of $20 would apply equally to each of them. Moreover it will be noticed that, in case of loss, the company does not agree that the value of the horse shall be fixed at $125, but the agreement is that "the amount claimed shall not exceed" that sum. This was clearly an attempt to limit the liability, not to determine value. As was said in the opinion in Central Ry. Co. v. Murphey: "Could any fair and reasonable mind ever reach the conclusion that there was between the plaintiffs and the defendant any agreement at all respecting the value of this particular car load of grapes, or that there was even a remote intention to make such an agreement?"

5. Should the presiding judge have submitted the question to the jury to decide as to whether this contract amounted to an actual bona fide valuation? On its face, it did not do so. Outside of the paper, there was no evidence of any actual valuation of this particular horse. It, with several others, was delivered to the railroad company together with certain sulkies, which seems to have indicated that the horses were to be used otherwise than as common draft animals. Eight horses were also shipped in two cars, and an attendant went with them. No inquiry was made as to their nature or value. The company had two kinds of blanks, one for use where live stock was shipped "released," the other where it was not. An agent of the defendant asked the plaintiff's agent if he wished to ship the horses "released," and, upon receiving an affirmative answer, filled one of the blanks, except as to the rate, which was filled in by the rate clerk.

[51] Acc. Chicago, etc., Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587 (1890).

There is only one "release rate" for horses. The rate clerk has the classification of the state railroad commission, and fills in the rate that belongs to that agreement.

A witness for the defendant testified that the rate was fixed at $27 per car between the points included in the transportation, "based on the valuation of $125," but he admitted that nothing was said to the shipper as to valuation. This was the entire transaction. True, the shipper admitted that he knew that if he had named a higher valuation on the horses he would have had to have paid a higher rate, and that if he had not shipped "released" the rate would have been much higher. But there was nothing in what transpired between the parties to show a bona fide effort to fix a value on the horse which was killed, or on any one or all of the horses. Every shipper who is asked whether he will ship "released" probably knows that if he does not do so the rate will be higher. But this does not change an effort to limit liability into an actual valuation of property.

The construction of the contract made in this case is controlled by the decisions in Georgia R. Co. v. Keener, supra, and Central Ry. Co. v. Murphey, supra. The decision in Southern Railway Co. v. Horner, 115 Ga. 381, 41 S. E. 649, is cited to sustain the contention that the case should have been submitted to the jury. In that case it is stated, in the report of facts, that "the testimony was in direct conflict as to the making of a special contract of shipment, * * * and that Lee [the defendant's agent] gave him a rate based on a valuation of $100 for the horse, and explained to him that the tariff required an addition of fifty per cent. for each additional $100 of valuation." The contract contained the following terms: "The said shipper or the consignee is to pay freight thereon to the said carrier at the rate of ——— per ———, which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event. * * * If horses or mules, not exceeding 100, $100 each." It was held that, under the terms of this contract and the evidence introduced, an issue was made as to whether in fact there was a valuation or an arbitrary preadjustment of damages, and that this was properly submitted to the jury.[52]

[52] In J. J. Douglas Co. v. Minn., etc., Ry. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860 (1895), Mitchell, J., said: "The agreed facts do not state that the carrier knew that the value of the goods was greater than that fixed on them by the shipper. But it is fair to presume that, if the carrier thought of the matter at all, it had good reason to suppose that, if the property was what it purported to be, it was worth more than $20 per barrel. But we do not think that this, if true, would be at all material, inasmuch as the valuation was one voluntarily fixed and agreed to by the shipper as the basis upon

The difference between submitting to the jury to determine, under the evidence, whether terms of this character inserted in a contract of affreightment constituted a bona fide and actual valuation or a mere preadjustment of damages, and, on the other hand, submitting to the jury the construction of the contract alone, which plainly on its face was not a valuation, but an effort to limit damages, is clear. * * *

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal. Judgment affirmed.[53]

which the carrier's compensation as well as responsibility should be determined and adjusted."

Acc. Jennings v. Smith (C. C.) 99 Fed. 189 (1900) shipper informed carrier that agreed value was too low.

Contra: Overland Mail, etc., Co. v. Carrol, 7 Colo. 43, 1 Pac. 682 (1883); U. S. Ex. Co. v. Bachman, 28 Ohio St. 144 (1875). And see 21 Harv. Law Rev. 38–43, 46.

[53] Acc. So. Ex. Co. v. Moon, 39 Miss. 822 (1863); Moulton v. St. Paul, etc., Ry. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781 (1883); Doan v. St. Louis, etc., Ry. Co., 38 Mo. App. 408 (1889); Schwarzchild v. Nat. S. S. Co. (D. C.) 74 Fed. 257 (1896).

"We have had much difficulty in determining the validity of the stipulation in the contract that, if loss or injury should occur for which the company is liable, the amount claimed should not exceed $50 for any one of the animals. If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal and the amount of freight received, we should not hesitate to declare it unjust and unreasonable. But as the case is presented it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. We cannot, therefore, pronounce it unjust and unreasonable, and it is the measure of appellant's liability." Brickell, C. J., in So. & No. Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 (1875).

Acc. Squire v. N. Y. C. R. Co., 98 Mass. 239, 93 Am. Dec. 162 (1867), semble; Richmond & Danville R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849 (1890); Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116 (1892).

There is a like conflict in the decisions as to the validity, in cases of negligent loss, of an agreement that damages shall be measured by value at port of shipment, or by invoice price. See 88 Am. St. Rep. 111, E. Cases upholding such an agreement include The Hadji (D. C.) 18 Fed. 459 (1883); Pierce v. So. Pac. Co., 120 Cal. 156, 47 Pac. 874, 40 L. R. A. 350, 354 (1897). And see Davis v. N. Y., etc., R. Co., 70 Minn. 37, 72 N. W. 823 (1897). Among cases contra are Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44 (1900); Ill. Cent. R. Co. v. Bogard, 78 Miss. 11, 27 South. 879 (1900).

In The Hadji, supra, Brown, J., said: "In stipulating, as in this bill of lading, that in case of loss or damage the liability of the shipowners should not extend beyond the invoice value of the goods, the parties have in effect agreed upon the value of the goods for the purpose of adjusting any loss that might arise; they have provided a rule of damages for themselves, to the effect that the owner should be indemnified for the actual cost of his goods, but should not claim any expected profits in a foreign market. There appears to me to be nothing so unreasonable or impolitic in this stipulation, or rule of damages, as to warrant the court in holding it void. In principle, it falls within the cases above cited of reasonable regulations which it is competent for the parties to make. It has nothing analogous, as it seems to me, to those stipulations which provide for a total exemption of a carrier from liability for his own negligence, which the supreme court, in Railroad Co. v. Lockwood [ante, p. 445], and in other cases, have condemned. * * * There are, moreover, special reasons of convenience and policy why this

## SOUTHERN EXPRESS CO. v. CALDWELL.

(Supreme Court of the United States, 1874. 21 Wall. 264, 22 L. Ed. 556.)

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee—places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than 90 days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

STRONG, J.[54] * * * The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue.

measure of damages may well be adopted between the parties and sustained by the court. In case of loss or injury it avoids controversy as to the value in foreign and distant countries, often a matter difficult to ascertain with any accuracy, and uncertain and unsatisfactory on the proofs. The invoice value, as the limit of liability, renders the ascertainment and adjustment of the damages comparatively easy, and tends materially to check the litigious prosecution of exaggerated claims of damage which this court has been often called on to rebuke."

An agreement that the carrier should not be liable for more than a specified amount unless the true value were stated has been held unenforceable as applied to negligent loss. Adams Ex. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57 (1871); Scruggs v. B. & O. R. Co. (C. C.) 18 Fed. 318 (1883); Conover v. Pac. Ex. Co., 40 Mo. App. 31 (1890); U. S. Lace Curtain Mills v. Oceanic, etc., Co. (D. C.) 145 Fed. 701 (1906). Contra: Pac. Ex. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107 (1891). Compare Oppenheimer v. U. S. Ex. Co. ante, p. 400.

An agreement increasing the evidence required to prove carrier's negligence is unenforceable. So. Pac. Co. v. Phillipson (Tex. Civ. App.) 39 S. W. 958 (1897); Cox v. Cent. Vt. Co., 170 Mass. 129, 49 N. E. 97 (1898).

For the effect of an agreement as to value in case of partial loss (e. g., where goods valued at $100 would, if they arrived sound, be worth $200, but because of damage are worth $150), see Nelson v. Gt. No. Ry. Co., 28 Mont. 297, 72 Pac. 642 (1903); U. S. Ex. Co. v. Joyce (Ind.) 72 N. E. 865 (1904).

Upon the whole subject, see Henry Wolf Bikle on Agreed Valuation as Affecting the Liability of Common Carriers for Negligence, 21 Harvard Law Rev. 32. Authorities are collected in 88 Am. St. Rep. 106; Carriers, 9 Cent. Dig. §§ 663–7, 4 Dec. Dig. §§ 158, 218 (2), (7).

[54] Parts of the opinion have been omitted.

He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within 90 days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company v. Lockwood [ante, p. 445]. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels easily lost or mislaid, and not easily traced. They carry them in great numbers.

Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry, hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such condi-

tions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And, still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. See Riddlesbarger v. Hartford Insurance Company, 7 Wall. 386, 19 L. Ed. 257, and the numerous cases therein cited.[55] * * *

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Judgment reversed.[56]

[55] The learned judge here reviewed cases against telegraph companies and common carriers in which similar provisions were set up in defense.

[56] In The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419 (1901), a stipulation in a bill of lading provided that claims for damage "must be presented to the company within 30 days from date hereof." A claim not presented for nearly 4 years was held to be barred. Brown, J., said: "The question of the reasonableness of the requirement is one largely dependent upon the object of the notice and the length of the voyage. Thus, a notice which would be perfectly reasonable as applied to steamers making daily trips might be wholly unreasonable as applied to vessels engaged in a foreign trade. Indeed, a 30-day notice, such as is involved in this case, would be wholly futile as applied to a steamship plying between San Francisco and trans-Pacific ports. Notice might also be deemed reasonable, or otherwise, according to the facts of the particular case. Thus, if the Queen had been driven out to sea, and was not heard from for 30 days, obviously the provision would not apply, since its enforcement might wholly destroy the right of recovery. The question is whether, under the circumstances of the particular case, the requirement be a reasonable one or not. The Queen was engaged in short trips and in general trade to San Diego, doubtless delivering merchandise in different parcels and in different quantities to large numbers of consignees at the termini, and at intermediate ports. If any damage occurred to such articles, it was of the utmost importance to the company to have the claim made as soon as possible, while the witnesses, who must often be sailors, difficult to find, and still more difficult to retain, might be reached, and while their memory was fresh, that the company might then know whether it had a defense to the claim. * * * It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable or worked a manifest injustice to the libelants, we should not give it effect."

In Southern Ry. Co. v. Adams, 115 Ga. 705, 42 S. E. 35 (1902), Little, J., said: "It can, we think, readily be seen that a stipulation making it a condition precedent in a case where live stock is shipped that the owner or consignee, shall, when such live stock reaches the place of its destination, give

## THOMPSON v. CHICAGO & A. R. CO.

(Kansas City Court of Appeals, 1886. 22 Mo. App. 321.)

ELLISON, J.[57] This is an action for damages sustained by plaintiff in the shipment of a lot of cattle.

The petition alleges "that, on the 3d day of April, 1883, at or about 7 o'clock p. m. of said day, he delivered to said defendant, already loaded into cars and in good condition for transportation, at Kansas City, Missouri, eleven cars of beef cattle, numbering in the aggregate 184 head, and two cars of sheep, numbering about 200 head, which the

notice to the agent of the company of a claim for damages before the stock is carried from such a place, and before the animals are intermingled with others, is reasonable; for, if such stock has become depreciated by delay in transportation, or want of proper attention on the part of the transportation company, such fact can be more readily ascertained at that time than afterwards, and it affords to the carrier an opportunity of protecting itself from an unauthorized claim. So, likewise, the stipulation that this notice shall be given before the stock is intermingled with others serves the purpose of identifying the stock which were actually shipped. It would seem, then, that such a stipulation prejudices no right of the owner or consignor, and at the same time protects the transportation company; and, following the authorities above cited, we must rule that not only could the carrier lawfully make a contract containing a stipulation of this character, but that the stipulation is a reasonable one."

For authorities, see Carriers, 9 Cent. Dig. §§ 670, 938, 4 Dec. Dig. §§ 159, 218 (3).

In Engesether v. Gt. No. Ry. Co., 65 Minn. 168, 68 N. W. 4 (1896), defendant railroad issued a bill of lading for cattle to be delivered at a point on a connecting line, which contained a stipulation that the shipper as a condition precedent to his right to recover for loss or injury, should give notice in writing to an officer or to the nearest station agent of defendant before the cattle were removed from the place of delivery or mingled with other stock. Mitchell, J., said: "In the present case the freight was live stock being shipped to the market, and which had to be speedily disposed of after it reached its destination, and was liable to deteriorate in flesh and weight by remaining in the stockyards, to say nothing of the expense of feeding. The place of delivery was beyond the line of defendant's road, and it does not appear that it had any agent or officer there, and there is no presumption that it had any. * * * Aside from the very indefinite and uncertain terms of this provision, we think that to require plaintiff, under the circumstances, as a condition of his right to recover damages, to keep his stock until he could prepare a written notice, and then go or send and hunt up an officer of the defendant company upon whom to serve it, was unreasonable and void. * * * In this case it is true that it was only 10 miles from the point where defendant turned over the stock to the other road to the place of its destination; but the principle is the same as if it had been 50 or 100 miles."

Acc. Smitha v. L. & N. R. Co., 86 Tenn. 198, 6 S. W. 209 (1887); Baxter v. Louisville, etc., R. Co., 165 Ill. 78, 45 N. E. 1003 (1897). As to the enforceability of a condition requiring notice of claim when the carrier knows the facts, see Richardson v. Chicago & A. R. Co., 62 Mo. App. 1 (1895); Kansas, etc., Co. v. Ayers, 63 Ark. 331, 38 S. W. 515 (1897); The St. Hubert, 107 Fed. 727, 46 C. C. A. 603 (1901); Freeman v. Kansas City So. R. Co., 118 Mo. App. 526, 93 S. W. 302 (1906).

Where the time specified for giving notice proves unreasonably short, it has been held that notice within a reasonable time was necessary. Osterhowdt v So. Pac. Co., 47 App. Div. 146, 62 N. Y. Supp. 134 (1900); The St. Hubert (D. C.) 102 Fed. 362 (1900).

[57] Part of the opinion has been omitted.

said defendant received, and by its agents and servants then and there agreed, for a valuable consideration paid by said plaintiff to said defendant, to transport said stock as speedily as possible, and without unnecessary delay, to the city of Chicago, in the state of Illinois; * * * that defendant failed to perform its contract in the shipping of said stock as it had agreed." The petition then assigned delay in transportation as the breach of defendant's contract of shipment, to plaintiff's damage in the sum of $1,650.60, for which judgment was prayed.

Defendant's answer, in addition to a general denial, contained five special defenses, in the third of which it was alleged "that, at the time it received said stock for shipment, written contracts were entered into between plaintiff and defendant for the transportation of the same, among the provisions of which was one requiring suit to be brought within 60 days next after any loss or damage should occur, or be thereafter forever barred, and the lapse of time should be conclusive evidence against the validity of the claim in any action begun thereon after that time." The answer then alleged the suit was not brought within the 60 days.

The reply to the new matter, relative to the special contract set up in the answer, alleged that plaintiff's damages were caused by defendant's negligence, and that he did not sue in the first instance because of assurances from defendant that his claim would be settled; that, as soon as he was notified that his claim would not be paid, he brought suit. The reply also pleaded want of consideration for the special contract.

The stock arrived at Chicago on April 8, and this suit was instituted June 29, 1883, 82 days thereafter. Plaintiff resides in Ottawa, Kan., 55 miles from Kansas City, the place where this action was instituted.

At the close of the evidence in the court below, an instruction was given declaring that plaintiff could not recover, and he brings the case here by writ of error.

It is conceded that this action is brought 12 days after the expiration of the time limited by the contract, but plaintiff seeks by his reply to excuse himself from complying with the contract for the following reasons: (1) The damage was occasioned by the negligence of defendant; (2) that immediately after discovering his loss he presented his bill for damages to defendant's chief officers and was assured by them that it would be justly and amicably settled, and that he relied upon this until notified by defendant's officers it would not be paid, when he immediately brought this action; (3) that the contract aforesaid was nudum pactum.

Conceding the damage was occasioned by defendant's negligence, and admitting the well settled law that a carrier may not stipulate against his own negligence, yet these concessions do not aid plaintiff, for this is not a stipulation relieving defendant of negligence,

but rather implying that it may be liable in this respect, and requiring an action to be instituted for such negligence within a given time. The stipulation does not relieve defendant of any duty, but imposes one on plaintiff.

There is a question of fact involved in the second matter set up in the reply. The indisputable evidence is that plaintiff did not bring his action as soon as notified that his claim was rejected, nor did he until 12 days thereafter. From the time of the loss until payment was finally refused, a correspondence between plaintiff and defendant's general superintendent intervened, in which plaintiff is assured that the claim was being investigated, and from conversations had with the adjusting officer, it was stated the writer felt quite sure the claim would be settled satisfactorily.

It is urged that the time covered by this correspondence should not be considered as a portion of the time limited by the contract.

Questions of this nature have frequently been before the courts. Though many of the cases are on contracts wherein the time limited is as to giving notice of a claim for damages or loss, while the case before us limits the time for bringing the action itself, I can perceive no distinction in principle, though it has been suggested that the limitation by contract was against the policy of the statute of limitation, or limitation by law.

This suggestion was urged before the Supreme Court of the United States, in the case of Riddlesbarger v. Hartford Insurance Company (1868) 7 Wall. 386, 19 L. Ed. 257, and it was there decided that such stipulations in contracts did not contravene the policy of limitation by the statute, and that the notion arose from a misconception of the nature and object of such statutes.

When the time limited by contract is specially named, the courts, as a matter of law, will say whether it be reasonable. If the limit is stated to be a reasonable time, the jury will say what period is reasonable, under the circumstances of the particular case. Five days has been held to be a reasonable time in which to limit a notice of loss, in the cases of Dawson v. Railway Co., 76 Mo. 514, Brown v. Railway Co., 18 Mo. App. 568, and McBeath v. Railway Co., 20 Mo. App. 445.

The fact that a portion of the period limited in the case was taken up by correspondence does not relieve the plaintiff of his obligation, for 12 days yet remained in which he might have instituted the suit. The evidence discloses no reason why he did not sue, after receiving notice that his claim was rejected, and before the expiration of the 60 days. * * *

Judgment affirmed.[58]

[58] In Gulf, etc., Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494 (1887), a statute made void agreements limiting or restricting the liability of common carriers. A bill of lading for cattle stipulated that as a condition precedent of his right to recover damages the shipper should

## SECTION 3.—LIMITATION OF LIABILITY BY STATUTE

### REVISED STATUTES OF THE UNITED STATES.

Sec. 4281. If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.[59]

give notice of claim before the cattle were removed, and that no suit should be sustained unless brought within 40 days after the damage should occur. The stipulation as to making claim was held void under the statute, and that as to the time for suing valid.

[59] This section is founded upon Act March 3, 1851, c. 43, § 2, 9 Stat. 635 (U. S. Comp. St. 1901, p. 2942). Compare Consulate of the Sea, c. 212, ante, p. 97, note.

"The liability of the carrier as such was well understood by the framers of the statute. It had long been settled so that no one could mistake it. By force of his public employment he became an insurer of the property intrusted to his care, and liable for its loss, irrespective of the cause, unless from the act of God or the public enemy. But involved in this greater liability and absorbed by it was a lesser liability as bailee for hire; of no consequence while the greater liability existed, but surviving the destruction of that, so that when the carrier ceased to be liable as carrier he yet remained liable as bailee. * * * So much and no more than that the section under consideration accomplished, for it distinctly removes the liability as carrier, without touching that as bailee. * * * We are further referred to the case of Hinton v. Dibbin, 2 Adol. & E. (N. S.) 646, in which it was held under a similar statute (1 Wm. IV, c. 68) that the carrier could not be held liable even for gross negligence; but that decision was founded upon an enactment from which the words 'liable as carrier' were conspicuously absent. * * *" Finch, J., in Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729 (1891), holding a common carrier by steamship liable for a box of pictures shipped by an artist, without giving notice of their character as provided in the statute, and lost by fault of its servants.

Acc. La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 (1906). For other cases under this section, see 4 Fed. St. Ann. 837.

Sec. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.[60]

Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

Sec. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

[60] This section is founded upon Act March 3, 1851, c. 43, § 1, 9 Stat. 635 (U. S. Comp. St. 1901, p. 2943). In the cases to which it applies, it relieves an owner not personally at fault from liability for the fault of the officers or crew of his vessel. Walker v. Transportation Co., 3 Wall. 150, 18 L. Ed. 172 (1865). It has been held not to apply to loss of passengers' baggage. The Marine City (D. C.) 6 Fed. 413 (1881). Or to the loss of a horse and vehicle on a ferryboat. The Garden City (D. C.) 26 Fed. 766 (1886). For other cases under this section, see 4 Fed. St. Ann. 838.

Sec. 4289 [as amended 1875, 1886]. The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters.[61]

Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945). That the individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners.

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## THE CITY OF NORWICH.

**(Supreme Court of the United States, 1886. 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.)**

The steamboat City of Norwich, owned by the Norwich & New York Transportation Company, collided with the schooner Van Vliet in Long Island Sound in April, 1866. The schooner was sunk. The steamboat was set on fire by the collision, and subsequently sank with her cargo. The owners of the schooner sued the owner of the steamboat in the District Court of the United States for the District of Connecticut, and eventually obtained a decree for about $22,000. The steamboat was raised, taken to Long Island, and repaired. She was then libeled in rem by owners of her lost cargo in the District Court of the United States for the Eastern District of New York, within whose territorial jurisdiction she was. Thereupon the owner of the steamboat, for the purpose of obtaining the benefit of the limited liability act of 1851 (Rev. St. §§ 4283–4287 [U. S. Comp. St. 1901, pp. 2943, 2944]), took proceedings in the Connecticut court to limit the damages recoverable from him in the suit there pending to that percentage of the vessel's value which the liability established in that suit bore to all the owner's liabilities arising out of the collision. On appeal to the Supreme Court of the United States that court held that the Connecticut court had no right to give relief in the form in

[61] These sections are founded upon Act March 3, 1851, c. 43, §§ 3, 4, 5, 7, 9 Stat. 635, 636 (U. S. Comp. St. 1901, pp. 2943–2945).

which it was asked to do so. Norwich Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585 (1871). It was suggested, however, that the owner might obtain the benefit of the limited liability act by appropriate proceedings in the District Court in New York which had possession of the vessel or of security given when she was released from arrest. The Supreme Court also promulgated rules of practice prescribing the nature and course of such proceedings. Rules of Practice in Admiralty, Nos. 54–57, 13 Wall. xii, xiii; Hughes on Admiralty, 462–464.

In conformity with these rules, the owner of the steamboat filed a petition in the District Court of the United States for the Eastern District of New York. The petition prayed the court to cause an appraisal to be made of the value of the petitioner's interest in the vessel and her pending freight, and, upon petitioner's paying into court or giving security for the value as appraised, to cite all persons having claims arising out of the collision to appear and prove their claims, and to enjoin them from prosecuting their demands in any other proceeding.

The court entertained the petition, and held that the value of the steamboat intended by the statute was, in this case, the value as the vessel lay after sinking, and was not her value before the collision, nor her value immediately after the collision and before she was damaged by fire, nor her value after she had been raised. The court also held that the liability of the owner was not increased by the fact that he was insured against his vessel's loss by fire and had been paid over $49,000 as insurance money. It further held that since no freight money had been paid or earned the owner was under no liability to damage claimants by reason of pending freight. The value of the steamboat was fixed at $2,500. The petitioner paid this sum into court, and a decree was made apportioning it among the persons who had proved claims in that proceeding, and discharging petitioner from further liability for the collision. On appeal to the Circuit Court the decree was affirmed. The Circuit Court found that the collision, though caused by negligence of the steamboat's officers or hands, was without design, neglect, privity, or knowledge of her owner. From the decree of affirmance, owners of cargo appeal to the Supreme Court.

BRADLEY, J.[62] * * * The next question to be considered is, at what time ought the value of the vessel and her pending freight to be taken, in fixing the amount of her owners' liability? Ought it to be taken as it was immediately before the collision, or afterwards? And if afterwards, at what time afterwards?

The first question has been repeatedly answered by the decisions of this court. We held in Norwich Co. v. Wright, and have held and

[62] The statement of facts has been rewritten. Parts of the opinion are omitted.

decided in many cases since, that the act of Congress adopted the rule of the maritime law as contradistinguished from that of the English law on this subject;[68] and that the value of the vessel and freight after, and not before, the collision is to be taken. But at what precise time after the collision this value should be taken has not been fully determined so as to establish a general rule on the subject. That is a question which deserves some consideration. In the case of The Scotland, 105 U. S. 24, 26 L. Ed. 1001, the collision occurred opposite Fire Island Light, and the steamer being much injured, put back in order, if possible, to return to New York; but was unable to get further than the middle ground outside and south of Sandy Hook, where she sunk, and nothing was saved but a few strippings, taken from her before she went down. We held that these strippings were all of the ship that could be valued, although she had run 30 or 40 miles after the collision. The value was taken, not as it was, or as it might have been supposed to be, immediately after the collision, but as it was after the effects of the collision were fully developed in the sinking of the ship.

An examination of the statute will afford light on this subject. Section 4283 declares that the liability of the owner of any vessel (for various acts and things mentioned) shall "in no case" exceed the value of his interest in the vessel and her freight then pending. When it says "in no case," does it mean that for each case of "embezzlement, loss, destruction, collision," etc., happening during the whole voyage, his liability may extend to the value of his whole interest in the vessel? Twenty cases might occur in the course of a voyage, and all at different times. Does not the provision made in section 4284, for compensation pro rata to each party injured, apply to all cases of loss and damage happening during the entire voyage—happening, that is, by the fault of the master or crew, and without the privity or knowledge of the owner? Pending freight is of no value to the shipowner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage. Does this not show that every "case" in which the principle of limited liability is to be applied means every voyage? We think it does. It seems to us that the fair inference to be drawn from section 4283 is that the voyage defines the limits and boundary of the casus or case to which the law is to be applied.

[68] "As explained in The Lottawanna, 21 Wall. 558, 22 L. Ed. 654 (1874), the maritime law is only so far operative in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute." Bradley, J., in The Scotland, 105 U. S. 24, 26 L. Ed. 1001 (1881).

The English statute (St. 53 Geo. III, c. 159, s. 1) limited liability to value of ship and freight, and was interpreted to mean value immediately before the cause of action arose. Wilson v. Dickson, 2 B. & Ald. 2 (1818). By English Merchant Shipping Act 1894, § 503, a shipowner's liability is limited for personal injury or loss of life to £15 for every ton of his ship's tonnage, and for injury to property to £8 for every ton, irrespective of the value of the ship.

This is rendered certain by the language of section 4284, which is: "Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses." There may be more than one case of embezzlement during the voyage, and more than one case of loss and destruction, and they may happen at different and successive times, yet they are to be compensated pro rata. This shows conclusively that it must be at the termination of the "voyage" that the vessel is to be appraised, and the freight (if any be earned) is to be added to the account for the purpose of showing the amount of the owner's liability.

This conclusion is corroborated by section 4285, which declares that it shall be a sufficient compliance with the requirements of the law if the owner shall transfer his interest in the vessel and freight to a trustee for the benefit of the claimants. In most cases this cannot be done until the voyage is ended; for, until then, the embezzlement, loss, or destruction of property cannot be known. And this was manifestly the maritime law; for by that law the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability, and, of course, this could only be done at the termination of the voyage. If the ship was lost, and the voyage never completed, the owners were freed from all liability. Boulay-Paty, Droit Com. Mar. tit. 3, § 1, pp. 263, 275 et seq.; Emerig. Contrats a la Grosse, c. 4, sec. 11, §§ 1, 2; Valin, Com. liber 2, tit. 8, art. 2; Consolato del Mare, cc. 34 (141), 186 (182), 227 (194), 239;[64] 2 Pardessus' Collection; Cleirac, Nav. de Rivieres, art. 15.

If, however, by reason of the loss or sinking of the ship, the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value) at the time of such breaking up and ending of the voyage must be taken as the measure of the owners' liability. In most cases of this character no freight will be earned; but if any shall have been earned, it will be added to the value of the ship in estimating the amount of the owners' liability. These consequences are so obvious that no attempt at argument can make them any plainer.

If this view is correct, it follows, as a matter of course, that any salvage operations, undertaken for the purpose of recovering from

[64] By the provisions of the Consolato del Mare above cited, the part owners of a ship are not liable beyond their shares for the master's fault in stowing goods on deck which leads to their jettison, or in providing insufficient equipment, and loss of the vessel discharges them even for money borrowed by the master in a distant port to buy supplies. "Let him beware how he lends or not, for the part owners have lost enough since each has lost his share."

the bottom of the sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can have no effect on the question of the liability of the owners. Their liability is fixed when the voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. And it makes no difference, in this regard, whether the salvage is effected by the owners, or by any other persons. Having fixed the point of time at which the value is to be taken, the statute does the rest. It declares that the liability of the owner shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. If the vessel arrives in port in a damaged condition, and earns some freight, the value at that time is the measure of liability; if she goes to the bottom, and earns no freight, the value at that time is the criterion. And the benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured, or by having her appraisement made, and paying the money into court, or giving a stipulation in lieu of it, and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability, for the measure is the same whichever course is adopted, but it enables the owner to lay out money in recovering and repairing the ship without increasing the burden to which he is subjected.

It follows from this that the proper valuation of the steamer was taken in the court below, namely, the value which she had when she had sunk, and was lying on the bottom of the sea. That was the termination of the voyage. * * *

Affirmed.[65]

[65] The parts of the opinion omitted include passages expressing the holding of a bare majority of the court that the owner's liability was not increased by his being indemnified by insurance for the loss of his ship. Compare O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469 (1897), which holds, in substance, that where a ship has been tortiously sunk, and its owner reimbursed by the tort-feasor for the loss, the sum so received is a part of the "value" of the ship.

If a shipowner has had an opportunity at the end of a voyage to discharge claims against him by surrendering his vessel, he is not relieved from liability on those claims by her loss upon a subsequent voyage. The Puritan (D. C.) 94 Fed. 365 (1899). A shipowner cannot limit liability upon his personal contract for supplies to his ship. Gokey v. Fort (D. C.) 44 Fed. 364 (1890). The limited liability act is available as a defense in a state court, and this is true, even though, as in an action for causing death, the right of action is conferred by a state law, and the state Constitution declares that the liability shall not be limited to less than actual damages. Loughlin v. McCaulley, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. Rep. 872 (1898). But the act regulates only maritime liabilities; that is to say, such causes of action as might be enforced in a court of admiralty and maritime jurisdiction. It does not apply to a right of action for damage to a building on land by fire caused by negligence on a ship. Goodrich Transportation Co. v. Gagnon (C. C.) 36 Fed. 123 (1888). For other cases under the act, see 4 Fed. St. Ann. 839–854.

## THE SILVIA.

(Supreme Court of the United States, 1898. 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241.)

GRAY, J. This was a libel in admiralty, filed June 14, 1894, in the District Court of the United States for the Southern District of New York, by the Franklin Sugar Refining Company, a corporation organized under the laws of the state of Pennsylvania, against the steamship Silvia, of Liverpool, owned by the Red Cross Line of steamers, to recover damages for injuries to a cargo of sugar, owned by the libelant, which had been shipped on or about February 15, 1894, upon the Silvia, at Matanzas, Cuba, for Philadelphia, under a bill of lading, by which the sugar was "to be delivered in the like good order and condition at the port of Philadelphia (the dangers of the seas only excepted)," upon payment of agreed freight, "and all other conditions as per charter party dated New York, 31st January, 1894."

The charter party, which had been made and concluded at New York, January 31, 1894, provided that the Silvia, then at Tucacas, Venezuela, should proceed as soon as possible in ballast to Matanzas for a voyage thence to Philadelphia, New York, or Boston, and contained these provisions: "The vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned (the act of God, adverse winds, restraint of princes and rulers, the queen's enemies, fire, pirates, accidents to machinery or boilers, collisions, errors of navigation, and all other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted). The said party of the second part doth engage to provide and furnish to the said vessel a full cargo, under deck, of sugar in bags. The bills of lading to be signed without prejudice to this charter."

The Silvia, with the sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed; but the iron covers were left open, in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and

the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage was wholly a matter of conjecture—and the water came in through the port, and damaged the sugar.

The decree of the District Court dismissed the libel, and was affirmed by the Circuit Court of Appeals. 64 Fed. 607; 35 U. S. App. 395, 15 C. C. A. 362, 68 Fed. 230. The libelant applied for, and obtained, a writ of certiorari from this court.

It was adjudged by this court at the last term that the act of Congress of February 13, 1893 (chapter 105, known as the "Harter Act" [U. S. Comp. St. 1901, p. 2946]), has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181.

But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The portholes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes; and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. Steel v. Steamship Co., 3 App. Cas. 72, 82, 90, 91; Hedley v. Steamship Co. [1892] 1 Q. B. 58, 65; Id., [1894] App. Cas. 222, 227, 228; Gilroy v. Price [1893] App. Cas. 56, 64.

The third section of the Harter act provides that, "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." 27 Stat. 445.

This provision, in its terms and intent, includes foreign vessels carrying goods to or from a port of the United States. The Scotland, 105 U. S. 24, 30, 26 L. Ed. 1001; The Carib Prince, above cited.

Not only had the owners of the Silvia exercised due diligence to make her seaworthy, but, as has been seen, she was actually seaworthy when she began her voyage.

This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo; but they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and, if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. Good v. Association, L. R. 6 C. P. 563; The Warkworth, 9 Prob. Div. 20, 145; Carmichael v. Association, 19 Q. B. Div. 242; Canada Shipping Co. v. British Shipowners' Association, 23 Q. B. Div. 342; The Ferro, [1893] Prob. 38; The Glenochil, [1896] Prob. 10.

In the case, cited by the appellant, of Dobell v. The Rossmore Co., [1895] 2 Q. B. 408, 414, the ship was unseaworthy at the time of sailing, by reason of the cargo having been so stowed against an open port that the port could not be closed without removing a considerable part of the cargo; and Lord Esher, M. R., upon that ground, distinguished that case from the decision of the circuit court of appeals in the present case.

Judgment affirmed.[66]

[66] Compare Knott v. Botany Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90 (1900); International Nav. Co. v. Farr, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830 (1901). See The Harter Act, 16 Harvard Law Rev. 157; The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794 (1906); 4 Fed. St. Ann. 854–864. The Harter act also relieves the vessel and her owner, upon the same condition of diligence to make seaworthy, from responsibility for loss resulting "from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

# CHAPTER V

# DURATION OF LIABILITY

## SECTION 1.—WHEN LIABILITY BEGINS

### MERRITT v. OLD COLONY & N. RY. CO.

(Supreme Judicial Court of Massachusetts, 1865. 11 Allen, 80.)

Tort against a railroad corporation to recover for damages done to a caloric engine sent by the plaintiff to the depot of the defendants in South Boston for transportation to South Abington, while being loaded upon the cars. * * *

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.[1]

DEWEY, J. The instructions given were correct, and sufficiently full to guide the jury as to their verdict.

The plaintiff introduced evidence tending to show that the engine was carried by a truckman to the freight station of the defendants, to be transported to South Abington; that notice of its arrival was given to the freight agent, who directed the truckman to drive near a derrick by a certain track at which heavy articles were laden upon the cars, and there wait till the men came, when they would run in a car and put it on board; that the truckman followed this order, and the men came, run in a car, and commenced loading the engine, the agent of the defendants superintending and directing the work, and the truckman being present also, giving assistance to prevent the chain which had been placed around the engine from slipping. The mode of placing the engine upon the cars by means of a derrick was an arrangement of the defendants, and they provided the derrick for that purpose.

The evidence on the part of the defendants, as to the superintendence and control of the operation of removing the engine from the sled of the truckman to the cars, conflicted with that of the plaintiff; and this was submitted to the jury. It became necessary to ascertain at what point, as respects the rights of the bailor, the truckman's responsibility for the safe transportation of the engine ceased, and when the same was cast upon the defendants. The court properly ruled that it was when the engine was delivered to and accepted by them for the purpose of transportation, and that in order to constitute

[1] Part of the statement of facts has been omitted.

such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine for the purpose of transportation. Story on Bailm. § 453.

Of course in deciding the question when the custody does thus attach, much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.

As to warehousemen, it has been held that as soon as the goods arrive and the crane of the warehouse is applied to them to raise them into the warehouse, the liability of the warehouseman commences, and it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle. Story on Bailm. § 445.

In the opinion of the court, the instructions were sufficiently full, and the further instructions asked were properly refused.

Exceptions overruled.

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## GREEN v. MILWAUKEE & ST. P. R. CO.

(Supreme Court of Iowa, 1874. 38 Iowa, 100.)

Action to recover the value of a trunk and contents of clothing alleged to have been lost or destroyed while in possession of defendant as a carrier. There was a trial to a jury, and a verdict rendered against plaintiff under an instruction of the court to the effect that there was no evidence showing that the trunk was delivered to defendant or its agents. From a judgment rendered upon this verdict plaintiff appeals.

BECK, C. J. The evidence disclosed the fact that plaintiff, desiring to take passage by an early morning train on defendant's road at Boscobel, in the state of Wisconsin, for Decorah, sent her trunk the evening before by a drayman to defendant's depot. It was left by the drayman in the waiting room, and as there were no employés of defendant about the premises, no notice thereof was given to any one. This was after business hours in the evening. It was shown that plaintiff had quarterly, for three years, been in the habit of making the same journey she was about to take, and had always sent her trunk the evening before, as she did in this case, and that other travelers were in the habit of doing the same thing when they went by the early train. The drayman testified that he had often left baggage at the depot under similar circumstances, but that his custom was to notify the depot agent or servants of defendant.

Upon this evidence the court directed the jury that there was no proof of the delivery of the trunk to defendant or its servants.

It is not claimed that defendant would be liable without a delivery, either actual or constructive, of the property to its agent or servant. That a delivery may be made at the proper place of receiving such

baggage under the express assent or authority of the carrier without notice to its employés will not, we presume, be disputed. It is equally clear upon principle that this assent may be presumed from the course of business or custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. The citation of authority is not required to support this position. See Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

The instruction which is the foundation of plaintiff's objection directs the jury that there was no evidence of a delivery of the trunk to the defendant. In this we think there is error. There was evidence tending to show a course of business on the part of defendant, a custom, to receive baggage left at the station house, as in this case, without notice to plaintiff's servants. Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced—whether a course of business, a custom, had been established, to the effect that a delivery of baggage at the station house without notice, was regarded by the defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom. It is a well-settled rule that the courts cannot determine upon the sufficiency of evidence to authorize a verdict where there is a conflict, or some evidence upon the whole case. In such a case an instruction to the effect that there is no evidence, and directing a verdict accordingly, is erroneous. Way v. Illinois Cent. R. R. Co., 35 Iowa, 585.

The judgment of the district court is reversed, and the cause remanded.[2]

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## TATE v. YAZOO & M. V. R. CO.

**(Supreme Court of Mississippi, 1901. 78 Miss. 842, 29 South. 892, 84 Am. St. Rep. 649.)**

TERRAL, J. The appellee in this case recovered judgment by a peremptory instruction, and the appellants insist that a peremptory instruction should have been given in their behalf. On the 28th of September, 1897, the appellants loaded upon a car of the defendant company, at Clack's station, twenty-four bales of cotton. The loading

[2] Compare Goldberg v. Ahnapee, etc., Ry. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899 (1899); Gregory v. Webb, 40 Tex. Civ. App. 360, 89 S. W. 1109 (1905).

In Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483 (1852), defendant was held liable as a common carrier for the loss of a hand bag delivered to him by an intending passenger, though the passenger did not pay fare, and, because of the loss of the bag, did not make the journey.

In Stewart v. Gracy, 93 Tenn. 314, 27 S. W. 664 (1893), a common carrier, who had accepted warehouse receipts for tobacco and had taken part of the tobacco from the warehouse, was held not liable for the loss of tobacco which remained in the warehouse.

of the car was finished after sundown, and after the local freight train of that day, which was accustomed to take loaded cars from Clack's, had passed on its return trip to Memphis, and no other local freight train, by which alone cotton was shipped from Clack's, would arrive at said station until the evening of the next succeeding day. Early on the morning of the 29th of September the car load of cotton was wholly consumed by fire, and this suit, being a consolidation of five suits, is to recover its value. Tate & Co. operated a public gin at Clack's, where the defendant company had a siding, but it had no station house or agent at that point. Japson & Keesee, who were in charge of Tate & Co.'s gin and plantation at Clack's, testified that when it was desired to ship cotton, one of them would inform the conductor of the local freight train, and the conductor would set out there an empty car for loading, and that when the car was loaded and ready for transportation, the local freight train desired to take the loaded car would be flagged, and the conductor of it informed that the car was ready for transportation, when the conductor would sign the shipper's loading account, if found correct, and attach the car to his train, and transport it to its destination.

The contention of the appellants is that they had delivered the twenty-four bales of cotton to the defendant company, and that the cotton was burned while in its custody; that the cotton was actually or constructively delivered to the railway company, and that it is chargeable for the loss. We think, however, that it is quite clear that the railway company had never come into possession of the cotton for transportation. The car, it was true, was the car of the company, and it was placed upon the company's siding at Clack's for being loaded, and the cotton was loaded into the car, but no servant of the company had any notice of the car being loaded and ready for shipment. Keesee testified that his recollection was (the trial being had some time after the loss), that, when the car was loaded, a man was left there with it, with the shipping account filled out, in order to stop the train and get the conductor's receipt for it. And it appears that the flagging of the local freight train and delivery of the shipper's loading account to the conductor was an essential feature of the shipping of cotton at Clack's. But Japson and others conclusively show that the local freight train for that day had already passed before the car was loaded, and no other train that could have been expected to take the car would come by there until after the car was burned. There was no constructive delivery of the cotton to the railroad company. Its proper servant, the conductor of the local freight train, by which it was desired to have this cotton transported, knew nothing of its being loaded into the car for shipment, and there could be no acceptance of the cotton for shipment without such knowledge, unless, indeed, there had been an agreement between the parties making the mere loading of the car an acceptance of the freight for transportation.

But no such agreement was shown. On the contrary, the clear course of dealing between the parties at Clack's showed that the shipper was to flag the proper local freight train, and deliver to the conductor of the train the car to be transported, with the shipper's loading account thereof. A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. In this case, according to the course of dealing between the parties, there could have been no delivery of the cotton to the railroad company, until it was loaded and the local freight train conductor had notice of the items of freight, its destination and of its readiness for transportation. Parties desiring to hold common carriers to a stricter responsibility than that imposed by the common law should provide therefor by contract, for, unless bound by contract otherwise, a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him, and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation, and the shipper's desire therefor; Hutchinson on Carriers, c. 4; Schouler on Bailments and Carriers, c. 3; Angell on Carriers, c. 140; 2 Kent's Commentaries, 608; Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, 303.

Affirmed.[3]

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## ST. LOUIS, A. & T. H. R. CO. v. MONTGOMERY.

(Supreme Court of Illinois, 1866. 39 Ill. 335.)

LAWRENCE, J.[4] This was an action upon the case brought by the appellee against the appellant to recover the value of a quantity of hay burned upon the cars of the appellant. It appears from the evidence that the hay was placed on the platform cars on Friday, and on Saturday morning the conductor of the freight train was about to take it away, when the plaintiff said he did not wish it to go until he

[3] Compare Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202 (1895); Pine Bluff, etc., R. Co. v. McKenzie, 75 Ark. 100, 86 S. W. 834 (1905). In the latter case, Battle, J., said: "Here appellant, in pursuance of its custom, at the request of the appellee, had left cars on its side track, with the agreement, implied, if not expressed, that it would remove the cars the next day, if they were loaded, and carry them on to their destination. Notice of that fact was given to appellant. The cars were loaded and closed. The control and possession of their contents were completely surrendered to the railroad company. Nothing remained to be done by the appellee. The cotton and seed awaited the coming of the appellant's train. The cars were in its possession, and were the receptacles in which it accepted the delivery of the cotton and seed. They were left there with that purpose and with that understanding. The delivery was complete and appellant is responsible for their loss."

[4] Part of the opinion has been omitted.

could see Mr. Ketchum, to whom he had sold it. In consequence of his request the cars were left, and the next day the hay was ignited by sparks thrown from the locomotive of a passing passenger train, and a considerable portion was consumed. The plaintiff recovered a verdict on the trial, and the defendant appealed.

There is nothing in the record showing carelessness on the part of the appellant, except the single fact of leaving the hay standing upon the side track exposed to the sparks of a passing train, and this carelessness and exposure resulted from the express request of the plaintiff. * * *

Neither can the company be made responsible through its liability as a common carrier. A common carrier, it is true, is liable for all losses not arising from the "act of God," or the public enemy, in neither of which categories would the loss, in the case before us, fall. But the technical liability of a common carrier does not attach until the delivery to him of the property is complete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier. He must exercise reasonable care, but he is not an insurer against all losses except those arising from the "act of God" and the public enemy. Angell on Carriers, § 134, and cases there cited. That was, in principle, the position of the defendants in the present case. They had received the goods and placed them on a car, and the plaintiff, with full knowledge of the risks to which they might be exposed from passing trains, requested that they should not be forwarded until he had seen Ketchum. From the moment that request was made, and while the defendants were detaining the hay in consequence of it, they were only liable for losses which might have been guarded against by the exercise, on their part, of ordinary care and diligence. * * *

Judgment reversed.

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## WADE v. WHEELER.

(Supreme Court of New York, 1870. 8 Lans. 201.)

This is an appeal from a judgment entered upon the report of a referee. * * *

PARKER, J.[5] * * * The defendants, as trustees of the second mortgage bondholders of the Northern Railroad Company, were engaged in the business both of operating the railroad and of storing grain. They had a warehouse at Ogdensburgh where they stored grain to await the orders of the owners. When an order for the shipment of grain was given, if accepted, defendants entered it upon

[5] Part of the opinion has been omitted.

their books, at the warehouse, and forwarded the grain upon the railroad to the person to whom it was ordered without any further act on the part of the consignor. When an order was put in for grain to be sent forward, the charge for storage ceased. * * *

The defendants received the wheat as warehousemen, and continued to hold it, as such, until they assumed the new relation of carriers. The question is, when did such new relation begin? The answer must be, I think, at the time when they accepted the order to transport the wheat to Potsdam. From that time they ceased to charge for storage, and held it on storage, no longer. Their holding it at the warehouse now was not for the benefit of the owner, but for their own convenience, and as accessory to its transportation. The circumstance that defendants had not, as both parties knew and understood, cars ready for its immediate shipment, and that it was to take its time, after other grain, which had been ordered forward before it, does not at all change the result; for still it was held merely for carriage, to be forwarded without further orders, at the earliest practicable moment. In Coyle v. Western Railroad Corporation, 47 Barb. 152, 153, 154, the court say: "There can be no doubt that the barrels were placed by the defendant's employés in the freight house, for the convenience of the company, with a view and for the purpose of facilitating their transportation to the place of destination, for which they were designed, and to which they were directed. These were not placed there to remain for any period of time, but to be forwarded at the earliest practicable period. Under such circumstances it is manifest that the defendant received the property for the purpose of transportation, and not as a warehouseman, and that the company is liable as a common carrier." So in Blossom v. Griffin, 13 N. Y. 569, 572, 67 Am. Dec. 75, the court say: "The defendants were both carriers and warehousemen. In such a case it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received." In the case at bar, it is true, the grain was not deposited in the warehouse for the purpose of being carried without further orders, but it was already there when the defendants undertook to carry it to Potsdam without further orders. And where goods are delivered to a carrier to be kept in his warehouse until further orders, the liability of the carrier will not attach until the goods are ordered to be carried; but when this order is given the responsibility of the carrier attaches at once. 2 Redfield on Railways, § 247.

The defendants, on accepting the order to carry the wheat to Potsdam, assumed the same relation as though they then received it for that purpose. Manifestly it can make no difference that the defendants already had possession when they undertook to transport the wheat. Did they, from the acceptance of the order, hold it only for the purpose of transporting it without further direction? This is the

test, as shown by all the authorities. And see 1 Smith's Leading Cases, 393, and cases cited. Under this test, I see no reason to doubt that the defendants were, at the time of the loss, holding the wheat as common carriers, and no longer as warehousemen, and were, therefore, liable.

The judgment must be reversed and a new trial granted, costs to abide the event.

New trial granted.[6]

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## WEBSTER v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521.)

Action by Elizabeth S. Webster, administratrix of the estate of William Webster, against the Fitchburg Railroad Company, for damages for the death of intestate by defendant's negligence. Verdict directed for defendant, and plaintiff excepts.

KNOWLTON, J. At the trial the plaintiff relied solely on her count under Pub. St. c. 112, § 212,[7] in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a 10-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the station in Somerville where the accident happened; and, immediately before he was struck and killed, he was running very rapidly, from the direction of the public street, across the defendant's premises, outside of the passenger station, to a track on which was an incoming

[6] Compare Schmidt v. Chicago & N. W. R. Co., 90 Wis. 504, 63 N. W. 1057 (1895).

In the following cases liability as common carrier was held to attach on acceptance of the goods: Clarke v. Needles, 25 Pa. 338 (1855), carrier's canal closed for repairs to aqueduct; Shaw v. No. Pac. R. Co., 40 Minn. 144, 41 N. W. 548 (1889), baggage held over with owner's consent for later train; London, etc., Co. v. Rome, etc., Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752 (1894), hay in freighthouse to be loaded into cars by shipper; Meloche v. Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301 (1898), shipper notified of lack of cars; No. Ger. Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426 (1903), baggage delivered five days before vessel's sailing date.

In the following cases liability was held to be that of warehouseman only: Watts v. Boston, etc., R. Co., 106 Mass. 466 (1871), part of a shipment delivered in successive wagon loads detained to await the arrival of the rest; Basnight v. Railroad Co., 111 N. C. 592, 16 S. E. 323 (1892), car loaded by shipper with lumber for Philadelphia moved by carrier to an adjacent track, but without notice of readiness or of consignee's name; Dixon v. Cent. of Ga. R. Co., 110 Ga. 173, 35 S. E. 369 (1900), goods to be weighed by carrier to ascertain freight, which was to be prepaid; Chicago, B. & Q. R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678 (1905), cattle in railroad's pens, from which they were to be taken by shipper for food and water before putting them on cars.

[7] By Pub. St. c. 112, § 212, a railroad company, which by its negligence "causes the death of a passenger," is liable to his personal representative in an action of tort.

train, apparently with a view to take another train, which was about to start for Boston, on the track beyond. It is contended in behalf of the plaintiff that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises, in a place designed for the use of passengers, outside of the station, and was about to take a train, he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company, to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations.

In a case like this the question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In Dodge v. Steamship Co. [post, p. 517] it was said that "when one has made a contract for passage upon a vehicle of a common carrier, and has presented himself, at a proper place, to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger.

In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present, and speaking by a representative who saw him, there was no instant when the answer to his request

would not have been: "We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way." The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. Dodge v. Steamship Co., ubi supra; Merrill v. Railroad Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; Com. v. Boston & M. R. Co., 129 Mass. 500, 37 Am. Rep. 382; Warren v. Railroad Co., 8 Allen, 227, 85 Am. Dec. 700; Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397.

Exceptions overruled.[8]

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## LEWIS v. HOUSTON ELECTRIC CO.

(Court of Civil Appeals of Texas, 1905. 39 Tex. Civ. App. 625, 88 S. W. 489.)

PLEASANTS, J.[9] * * * The charge complained of required appellant to prove that his injuries were caused by the failure of appellee's employés to use ordinary care, and it is unnecessary to cite authority to sustain the proposition that a carrier owes its passengers the duty to exercise that high degree of care to prevent injury to them which a very careful, prudent, and competent person would exercise under like circumstances. It follows that, if the pleading and evidence raise the issue of whether appellant sustained the relation of passenger to the appellee carrier at the time he was injured, the charge contains an affirmative misstatement of the law, which will require a reversal of the judgment of the trial court.

From the evidence offered by the appellant, before set out, the jury were authorized to find that he left his home with the intention of taking passage on appellee's car to the city of Houston, and, in furtherance of this intention, he took a position near appellee's track at a place where it was accustomed to stop its cars for the purpose of receiving passengers; that when the car, on its way to the city, approached the appellant, he called and signaled to the motorman to stop; and that the motorman saw his signal, or heard his call, and slowed the car down, and the appellant, being prepared and willing to pay his fare, and believing that the car was being stopped for the purpose of taking him on as a passenger, attempted to board it, and, while so doing, was injured.

The pleading supports these facts, and, if they are true, appellant was, in contemplation of law, a passenger at the time he received his

[8] In Grosvenor v. N. Y. Cent. R. Co., 39 N. Y. 34 (1868), plaintiff brought to defendant's freight station a vehicle intended for shipment, left it on the station platform, and notified defendant's servant that he had done so. The servant did not see the vehicle. It was so placed that it projected beyond the platform and was damaged by a passing train. The court held in an action for the damage that the plaintiff should have been nonsuited.

[9] Parts of the opinion are omitted.

injuries; and appellee was charged with the duty of using that high degree of care to protect him from injury which a very careful, prudent, and competent person would have used under like circumstances. It may often be difficult to determine just when the relation of carrier and passenger begins, and what acts of the parties are necessary to create such relation, but there are certain well-established general principles by which the facts of each particular case must be tested. The relationship may arise before the person desiring to become a passenger actually gets on the conveyance of the carrier, and it may continue after he leaves the conveyance, but it can only be created by contract between the parties, expressed or implied.

From the nature of the business conducted by street car companies, no express contract of carriage is made with the great majority of those who ride on their cars, and the essential elements of the contract—the offer and its acceptance—must ordinarily be implied from the acts of the parties. When a person desiring to become a passenger upon a street car stations himself at a place where the cars are accustomed to receive passengers, and signals or calls to the motorman of an approaching car to stop the car, and such signal is seen by the motorman, and the car halted, an acceptance of the offer to become a passenger will be implied from the act of the motorman in stopping the car, and such person will be regarded as a passenger while he is in the act of getting upon the car. If in such case the person desiring to become a passenger attempts to board the car before it comes to a full stop, he is not necessarily guilty of contributory negligence; and, if the speed of the car was slackened to such an extent as to lead him to believe that it was being stopped to allow him to get on, and a person of ordinary care would have so believed, and have attempted to get upon the car, he should be regarded as a passenger while making such attempt.[10]

It is immaterial that the motorman may not have intended to stop the car for the purpose of allowing the passenger to get on. If the latter was at a place where passengers were usually received, and gave the usual signal, which was seen by the motorman, and he thereupon slackened the speed of the car to such an extent as to lead a person of ordinary care to believe that he was thereby invited to become a passenger, such relationship would be created; the motorman not giving any warning that the car was not being stopped for the purpose of receiving passengers. Under such circumstances, the carrier would not be heard to say it had not given an implied acceptance of the offer to become a passenger.

It is a universal rule of law that one cannot disclaim responsibility for the consequences which usually and naturally result from his

[10] Acc. No. Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672 (1892); Balt. Trac. Co. v. State, 78 Md. 409, 28 Atl. 397 (1894); O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680 (1903).

acts. If the appellant, in the exercise of ordinary care and prudence, could assume that the act of the motorman in checking the car was in response to his signal, and for the purpose of allowing him to board it, in acting upon such assumption and attempting to get on the car he had the right to rely upon the performance by the motorman of his duty to use that high degree of care to protect him from injury which the law requires a carrier to exercise for the safety of its passengers. In other words, if the act of the motorman, who had seen appellant's signal, reasonably induced appellant to believe that he was accepted as a passenger, while so believing he was entitled to protection as such. * * *

The jury might have concluded that the act of the motorman in increasing the speed of the car before appellant had succeeded in his attempt to board it was not, under the circumstances, a failure to use ordinary care, since that act could not be held negligence as a matter of law. * * *

Reversed.[11]

[11] One is ordinarily entitled to the care due a passenger if he enters a train at a station, though without the carrier's knowledge. Choate v. Mo. Pac. Ry. Co., 67 Mo. App. 105 (1896). Or while entering a street car standing at a corner. Kane v. Cicero, etc., Co., 100 Ill. App. 181 (1902). But compare Foster v. Seattle Elec. Co., 35 Wash. 177, 76 Pac. 995 (1904). But not while boarding a railroad train without the carrier's knowledge at a place not a station, though the train has stopped because he flagged it. Ga. Pac. Ry. v. Robinson, 68 Miss. 643, 10 South. 60 (1891). Nor while attempting to board a moving train leaving a station. Merrill v. Eastern R., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885). In the latter case, Holmes, J., said: "We may admit that if he had reached a place of safety, and seated himself inside the car, the bailment of his person to the defendant would have been accomplished, and that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him at the threshold, and had put himself in the proper place for the carriage of passengers."

So one is not ordinarily a passenger while boarding a moving street car without the carrier's knowledge. Schepers v. Union Depot Co., 126 Mo. 665, 29 S. W. 712 (1895). Or while boarding a car which is coming to a stop for one, if there is no indication of a present readiness to permit passengers to enter. Schaefer v. St. Louis Co., 128 Mo. 64, 30 S. W. 331 (1895). Or while boarding a train stopped only to let passengers off, though he supposes it stopping to receive passengers. Jones v. B. & M. R. Co., 163 Mass. 245, 39 N. E. 1019 (1895). But one may be a passenger, though on a wrong train by mistake. Lewis v. Del. & H. Canal Co., 145 N. Y. 508, 40 N. E. 248 (1895). One, however, who by mistake entered a car bound for the car house and not intended for passengers was held not to be a passenger. Robertson v. Bost, etc., Co., 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314 (1906).

In Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827 (1901), plaintiff's intestate was struck and killed by defendant's train, as he was crossing its track on the sidewalk of a public street on his way to take his usual morning train, then standing at the station a short distance away. He had a ticket in his pocket. A platform for the use of passengers began at the sidewalk just on the other side of the track, and ran alongside the track in front of the station. The declaration was founded upon the carrier's duty to its passenger. It was held that these facts did not show plaintiff to be a passenger, and that, if not such, there could be no recovery. Cartwright, J., said: "In June v. Railroad Co., 153 Mass. 79, 26 N. E. 238,

## DUCHEMIN v. BOSTON ELEVATED R. CO.

(Supreme Judicial Court of Massachusetts, 1904. 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580.)

BARKER, J.[12] The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that, as the car approached the plaintiff, he went toward it for the purpose of entering it, having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell, striking a sign upon the car, and the pole and sign struck the plaintiff; he being in the exercise of due care, and the defendant negligent. * * *

After a verdict for the plaintiff, the case is before us upon the defendant's exception to the refusal of the judge to give the rulings requested, and upon an exception to the portions of the charge which stated that a person may have the rights of a passenger as he approaches a street car, and the degree of care owed to a person under those circumstances. * * *

This leaves as the turning point of the case the question whether a foot traveler on the highway, who is approaching a street car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraor-

a person was walking towards the station on a plank walk, on the premises of the railroad company, intending to take a train, and was struck by another train. The court held that he was not a passenger, and said that argument was not necessary to show that a man walking towards a railroad station, with the intention of buying a ticket and taking a train after he got there, was not a passenger, even if he might be in the same place if he had begun his journey. If the relation has never been entered into, the question is not the same as where a passenger may rightfully be without ceasing to be a passenger after the relation has been assumed. * * * Since a railroad company owes the duty of protection to its passengers, it seems plain that the circumstances must be such that the company will understand that such a person is a passenger in its care and entitled to its protection. The company certainly has a right to know that the relation and duty exists, and the passenger must be at some place provided by the company for passengers, or some place occupied or used by them in waiting for or getting on or off trains. Whenever a person goes into such a place with the intention of taking passage, he may fairly expect that the company will understand that he is a passenger and protect him. If he could be a passenger before reaching such a place, there would be no limit or place where it could be said that he became a passenger. The intention of taking a train would only prove a purpose to enter into the contract relation, but would not create it. Any person walking towards a train on a public sidewalk might have no intention whatever of taking the train, but might have an intention to keep on along the street. So long as a person merely intends to be carried, but has not reached any place provided for passengers or used for their accommodation, he is not a passenger."

See, further, as to when one at a railroad station is a passenger. Poucher v. N. Y. C. R. Co., 49 N. Y. 263, 10 Am. Rep. 364 (1872); Chicago, etc., Co. v. Chancellor, 60 Ill. App. 525 (1895); Andrews v. Yazoo & M. V. R. Co., 86 Miss. 129, 38 South. 773 (1905); 21 Harvard Law Rev. 252-254.

[12] Parts of the opinion are omitted.

dinary degree of care due to passengers from common carriers, at least so far as any defect in that car is concerned. In other words, the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway, where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind, and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth, or the street clear of obstructions to his progress, than it owes to all other travelers on the highway. It is under no obligations to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such a person, who has not yet reached the car, there is any other duty, as to the car itself, than that which the carrier owes to all persons lawfully upon the street.

There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car, but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveler on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others. The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier; and its obligation as such does not arise until the intending passenger is within its control.

We are unwilling to go farther than the doctrine stated in Davey v. Greenfield Street Railway Co., 177 Mass. 106, 58 N. E. 172, that, when there has been an invitation on the part of the carrier by stopping for the reception of a passenger, any person actually taking hold of the car and beginning to enter it is a passenger. See Gordon v. West End Street Railway Co., 175 Mass. 181, 183, 55 N. E. 990, and cases cited. If the instructions allowed the jury to find for the plaintiff only in case the car had reached a usual stopping place, and had stopped to receive him, there was error in ruling that under those cir-

cumstances, and before he had actually reached the car, he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveler on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street car, or just is about to board one, he does not have the rights of a passenger.

Exceptions sustained.[13]

## SECTION 2.—WHEN LIABILITY ENDS

### ADAMS EXPRESS CO. v. DARNELL.

**(Supreme Court of Judicature of Indiana, 1869. 31 Ind. 20, 99 Am. Dec. 582.)**

FRAZER, J.[14] This was a suit against the appellant as an express carrier, by the appellee, to recover the value of United States bonds to the amount of $21,000, intrusted by the appellee to the express company, to be conveyed from Indianapolis to the village of Waldron, consigned to the appellee, and lost by the negligence of the appellant, and not delivered to the plaintiff.

There was an answer in five paragraphs, only two of which need be noticed:

1. General denial.

2. That the defendant kept an agent and office at Waldron, and plaintiff resided there; that W. was a small village to which valuable packages were seldom sent, the express business of the defendant at that point being so small as not to require or justify the defendant in keeping an iron safe, and none was therefore kept there by it, of all which the plaintiff had notice; that when the package was delivered by the plaintiff to the defendant at Indianapolis the former well knew that by due course of transmission it would arrive at Waldron at noon on the 11th of May, 1866, at which hour it did safely arrive and was ready for delivery to the plaintiff; that the plaintiff was absent from home during all that day, and had no agent there, so that delivery to him in person could not be made on that day during business hours, though the defendant was then ready to make such delivery; that the

[13] Acc. Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297 (1894). And see Foster v. Seattle Elec. Co., 35 Wash. 177, 76 Pac. 995 (1904). Contra: Smith v. St. Paul, etc., Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 (1884). And see Keator v. Scranton Trac. Co., 191 Pa. 102, 113, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758 (1899), and a criticism of the principal case in 21 Harvard Law Rev. 256–258.

[14] Part of the opinion is omitted.

defendant afterwards, on that day, deposited said package in a good and secure iron safe of one Haywood, reputed to be a respectable and responsible merchant of the village, and caused the safe to be securely locked, said safe being the most secure place of deposit in the village; that on that night the safe was robbed by burglars and the bonds stolen, wherefore it became impossible to deliver.

It is assigned for error, that a demurrer was sustained to the second paragraph of the answer. * * *

Personal delivery of the package was one of the duties of the carrier as such. The answer shows that this was rendered impossible by the plaintiff, in consequence of his absence, with a knowledge by him of the arrival of the package. Could he thus knowingly and on purpose prolong the extraordinary liability of the defendant as insurer, by putting it out of the power of the latter to terminate that liability? It was the interest of the carrier to terminate its liability as insurer as soon as possible, and it was its right and duty to do so within a reasonable time, by delivery. Such was the nature of the contract. This right to terminate liability as insurer it was not in Darnell's power to take away, by design, or to promote his convenience; for to do so would be to secure to himself an additional insurance not contracted for. If his interests, convenience, or pleasure required his absence, the consequences of such absence should fall upon himself, and not upon another. Such absence, preventing delivery, would not discharge the defendant from all responsibility, but it would end its liability as carrier; thenceforth its liability would be that of a bailee, not liable as insurer, but for such reasonable care of the property as prudence would require; and the paragraph of the answer under consideration certainly shows such care.

The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and that each must be maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition. We are not aware that it has ever been questioned. It has, on the contrary, been recognized by many decisions, but in none that we are advised of has it been so plainly declared as in Roth v. Buffalo, etc., R. R. Co., 34 N. Y. 548, 9 Am. Dec. 736. See, also, Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381; Richardson v. Goddard [ante, p. 139].

It may not be possible always to fix the exact time when the carrier's responsibility as insurer ceases, and when he becomes a mere bailee in deposit or otherwise. But where, as is alleged here, the consignee has notice of the arrival, and the carrier is ready to deliver, it seems to accord with reason as well as authority that then the liability as carrier ends. 34 N. Y. 548, 9 Am. Dec. 736, supra; Young v. Smith, 3 Dana (Ky.) 91, 28 Am. Dec. 57.

It is urged, however, that the appellant had, upon the trial, the full benefit of all the facts alleged in the second paragraph of the an-

swer. But this is a mistake. Most of the facts alleged were in evidence, it is true, and properly so under other issues; but the court instructed the jury, that "if the plaintiff, to whom the package was consigned, was at the place where the package was to be delivered, the next day after its arrival, and ready to receive the same, it was within a reasonable time." This instruction would effectually deprive the appellant of the benefit of the facts. It told the jury very plainly that those facts did not relieve the carrier of responsibility as insurer. If the facts as pleaded were sufficient, then the instruction was obviously wrong. * * *

Reversed and remanded.[15]

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## WITBECK v. HOLLAND.

**(Court of Appeals of New York, 1871. 45 N. Y. 13, 6 Am. Rep. 23.)**

Appeal from a judgment for plaintiff, entered upon the report of a referee in an action against the treasurer of the American Express Company, a joint-stock association, to recover for the loss of a package of money received by the American Express Company from the Adams Express Company, a prior carrier, addressed to Martin Witbeck, at Schenectady, N. Y. The package was transported to Schenectady, and came to the hands of the local agent of the American Express Company on December 14, 1864. Witbeck then resided at Schenectady, and continued to reside there until January 17, 1865.

The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the directory and did not find his name in it. The next day the agent filled up a notice and addressed it to Martin Whitbeck, Schenectady, and deposited it in the post office. Between one and three days thereafter, the agent inquired of two men, conductors upon the N. Y. Central Railroad, running from Schenectady to Troy, and also inquired of John Brandt, the city treasurer of Schenectady, whether they knew Martin Whitbeck, and they replied they did not.

The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office till January 17, 1865, when the office was burglariously opened in the night, the safe blown open, the package abstracted and stolen, and has never been recovered.

The notice put in the post office was not received by Martin Witbeck, though inquiries were made several times at the post office while

[15] Compare Baldwin v. Am. Ex. Co., 23 Ill. 197, 74 Am. Dec. 190 (1859). In that case Breese, J., said: "* * * He says it was the custom at the express office to enter the packages received in a delivery book, which is also the receipt book, and by which book they deliver to consignees, who sign a receipt in this delivery book. Now this package was never entered on this book, and of course was not ready for delivery."

it was there, by his wife and father, for letters for themselves and for him.

GROVER, J.[16] * * * When the defendant received the package from the Adams Company at New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady would have been incurred.

The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence, to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the question will be mixed, both of fact and law. In the present case the finding of the referee is clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so inattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made, delivery would have been made and the loss would never have occurred.

There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendant accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The plaintiff had the right to prove this fact if he could. But the testimony given

[16] The statement of facts has been partly rewritten, and a portion of the opinion omitted.

in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.[17]

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## NORWAY PLAINS CO. v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1854. 1 Gray, 263, 61 Am. Dec. 423.)

Action of contract upon the agreement of the defendants to transport certain goods from Rochester, N. H., to Boston.

SHAW, C. J.[18] * * * The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston, in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, N. H., the one October 31, 1850, and the other November 2, 1850.

By the facts agreed it appears that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday, the 2d of November, and were then taken from the cars, and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery, at least as early as Monday morning, the 4th of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November; the cars arrived late; Ames, the truckman, knew from inspection of the waybill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon, in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year, the doors were closed. In the course of the night the depot accidentally took fire and was burnt down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care on the part of the railroad corporation, or their agents or servants.

[17] Acc. Am. Ex. Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691 (1868).

In Laporte v. Wells Fargo Express, 23 App. Div. 267, 48 N. Y. Supp. 292 (1897), the consignee was unknown to the carrier, two days had elapsed since the mailing to him of a notice addressed to him at the town to which the goods were sent, and he lived in a neighboring town. The court ruled that the carrier's exceptional liability was at an end.

[18] Parts of the statement of facts and of the opinion have been omitted.

We understand the merchandise depot to be a warehouse, suitably enclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses used for the storage of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track, on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is whether, under these circumstances, the defendants are liable. * * * Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods, during the transit, except those arising from the act of God or a public enemy. * * * If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in Hyde v. Trent & Mersey Navigation, 5 T. R. 397. "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is that the car cannot leave the track, or line of rails, on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and

a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner.

From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: First, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have

been landed and stored, the liability is one of a very different character,—one which binds them only to stand to losses occasioned by their fault or negligence. * * *

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. Where a consignee of goods, sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon office, or warehouse of the common carrier, it was held, that the transit was at an end, when the goods were received and placed in the warehouse. Row v. Pickford, 8 Taunt. 83. Though this was a case of stoppage in transitu, it decides the principle. But another case in the same volume is more in point. In re Webb, 8 Taunt. 443. Common carriers agreed to carry wool from London to Frome, under a stipulation that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse, until the consignor was ready to receive it. Wool thus carried, and placed in the carriers' warehouse, was destroyed by an accidental fire; it was held that the carriers were not liable. The court say that this was a loss which would fall on them, as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered, or if, for any reason, the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable, as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send

special notice to each consignee of each parcel of goods or single article forwarded by the trains. * * * But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied, for passenger cars, so that goods may arrive and be unladen at an unsuitable hour of the night to have the depot open for the delivery of the goods.

We think, therefore, that it would be alike contrary to the contract of the parties and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule that delivery from the cars into the depot terminates the transit. If, therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.

Judgment for the defendants.

## MOSES v. BOSTON & M. R. CO.

(Supreme Court of New Hampshire, 1856. 32 N. H. 523, 64 Am. Dec. 381.)

Case for the value of ten bags of wool delivered by plaintiff to defendant railroad company to be carried to Boston. At the trial defendant gave evidence tending to show that the wool arrived at Boston and was placed on the platform of defendant's freight station, separated from other goods and ready for the consignee to take away, and that it was there burned in a fire which destroyed the station. By consent of parties and subject to the opinion of this court a verdict was entered for plaintiff upon the answers of the jury to specific questions. Defendant moved to set the verdict aside.

SAWYER, J.[19] * * * If the verdict is to be sustained, it is clear that it must be upon one or the other of the grounds: First, that the jury, having found the fact in answer to the second question, that the wool was not removed from the cars a sufficient time before the fire to enable the consignees to remove it with reasonable diligence on their part and on the part of the plaintiff, it continued down to the time of its loss in the hands of the defendants as common carriers, their liability, as such carriers, being held in law not to have terminated until the consignees had had reasonable opportunity after it was taken from the cars; or, second, that the jury, having found in answer to the third question the other fact, that the wool was lost through the negligence of the defendants, they are liable for the consequences of that negligence in the loss of the wool, in whatever capacity they held it, whether as carriers, as depositaries, or as warehousemen. * * *

The wool in this case was received and conveyed by the defendants in their ordinary employment as common carriers. It was not of a value disproportionate to its bulk, and was such that no deception could have been practiced upon them as to the extent of the risk they incurred. In the transportation of such commodities their responsibility as carriers commences with the receipt of the goods, though not put by them immediately on the transit, and it ceases only when they have reached their destination and their control over them as carriers has terminated. That control must continue until delivery, or a tender or offer to deliver, or some other act which the law can regard as equivalent to a delivery. The delivery of goods conveyed by railroad is necessarily confined to certain points on the line of the railroad track. Railroad companies cannot, like wagoners, pass from warehouse to warehouse, and there discharge their freight to the various consignees upon their own premises. They consequently establish certain points as places of delivery, and there unlade their cars of such of the freight as may most conveniently find its ultimate destina-

[19] The statement of facts has been rewritten. Parts of the opinion are omitted.

tion from those respective points. But while it is in the process of unloading, and afterwards, while awaiting removal, it must be protected from the weather and from depredation. Freight is brought over the road at all hours, by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air.

Until the goods have passed out of their custody and control into the hands of the proper person to receive them, they have a duty to perform in the preservation and protection of the property even after their responsibility as common carriers is at an end. Smith v. Nashua, etc., R. R. Co., 27 N. H. 86, 59 Am. Dec. 364. It thus becomes a matter of necessity for them to provide depots, or warehouses, for the reception of freight at the stations established for its delivery. If the owner or consignee, or other person authorized to receive the goods, is present at the time of the arrival, and has opportunity to see that they have arrived, and to take them away, this may be regarded as equivalent to a delivery. They must be understood after this to remain in the charge of the company, for his convenience, as depositaries or bailees for hire. In such case, the grounds upon which the common-law liability of the carrier is made to rest have so far ceased to exist that there is no longer any just occasion for holding the company to that stringent responsibility in reference to those goods. They are no longer in the course of transportation, beyond the reach of the owner, and under the exclusive control and observation of the carrier. The owner has again got sight of his property, and is in a situation, to some extent, to oversee and protect it. Nor is he any longer under the difficulties and embarrassments in attempting to make proof of subsequent fraud or negligence as when it was on its passage beyond the reach of his observation and under the private control of the carrier. The facilities and temptations to fraud and collusion in the embezzlement or larceny of the goods are also removed, or at least greatly diminished.

It is upon these considerations that the strict liability of the carrier is founded. * * * The inquiry then is: At what moment after the goods conveyed by a railroad company in their cars have reached the point on the line of the railroad where they are to be delivered may the reasons upon which the common-law liability of the carrier is founded be said to cease, when there is no person present at their arrival authorized to receive them, and ready to take them away?

That it is the duty of the consignee to come for them is clear, but it would be quite as impracticable for him to be at the place of delivery at the precise moment of their arrival, or of their being unladen from the cars, without actual notice to him of their arrival, as it would be for the company to diverge from their line of road in order to

deliver them at his place of business, or to send notice to him of their arrival, before proceeding to unload them. The arrival may be in the night, or after the expiration of business hours at the station, or at so late a period before it as to render it impossible for him to get them away within the hours of business. If, under such circumstances, they have been removed from the cars and placed in the warehouse, it cannot be said that they are so placed and kept there until the gates are opened, and business resumed upon the following day, for any purpose having reference to the convenience and accommodation of the owner or consignee, nor can the proceeding, upon any sound view, be considered as equivalent to a delivery. The same persons—the servants of the company—continue in the exclusive possession and control of the goods as when they were on their transit, and they are equally shut up from the observation and oversight of all others. The consignee has had no opportunity to know that they have arrived, and in what condition, and is in no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed, or damaged by their fraud or neglect subsequently to their removal, and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually in transitu—the declarations of the servants of the company, they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement.

It is obvious, too, that the opportunities and facilities for embezzling the goods, and for other fraudulent or collusive practices, must continue to be equally tempting after their removal, under such circumstances, as before. The risk of detection, in some respects, may be made even less than before, by the greater facilities which the servant of the company in charge of the warehouse has of manufacturing evidence of a burglary, or creating proof of the destruction of the goods by fire, set by himself for the purpose of concealing his agency in their larceny. For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them any oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest have equal application after the goods are removed into the warehouse as before, until the owner or

consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk.

It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers to themselves as warehousemen. The question still is: When, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made? If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession, under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment, for the reason that he may not be disposed to intrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be delivered at the arrival of the train, at whatever hour that may happen to be, whether in the night or the day, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend.

It is to be supposed that the consignee has been advised by the consignor of the fact that the goods have been forwarded, and that he has taken, or is prepared to take, proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the hours established for the arrival of the trains, and in unlading the cars, and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or

better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as but for those peculiar circumstances would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.[20]

In the case now under consideration there was conflicting evidence as to the time when the train by which the wool was carried arrived at the depot in Boston. * * * That the verdict, in answer to the second question submitted to the jury, was therefore warranted by the evidence is quite clear; and as there are no legal exceptions to the proceedings upon the trial, so far as they relate to this point, the answer of the jury to that question establishes the fact that the consignees had no reasonable opportunity, after the wool was taken from the cars, to come and inspect it so far as to see whether from its outward appearance it corresponded with the letter of advice from their consignor and to remove it before it was destroyed. This fact being established, upon the views of the law entertained by the court the transit had not terminated, and the defendants continued liable for the wool as carriers down to and at the time of the loss; and the general verdict entered for the plaintiff may well be sustained upon the original and the second and fourth amended counts.

We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the supreme court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of Norway Plains Co. v. these defendants [ante, p. 500]. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot ready for delivery, whether it be done in the day time or in the night, in or out of the usual business hours, and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class of carriers of a plain, precise, and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we can-

[20] "What is a reasonable time? This is not a time varying with the distance, convenience, or necessities of the consignee; but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods." Brewer, J., in L., L. & G. R. Co. v. Maris, 16 Kan. 333 (1876).

Whether the carrier's liability has changed to that of an ordinary bailee is, if the facts are undisputed, for the court. Tallassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167, 29 South. 203 (1900).

not but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes.

It is unnecessary, then, to consider the exceptions taken upon the other view of the case, as an action against the defendants for negligence in their care of the wool after their liability as carriers had ceased.

Judgment upon the verdict.[21]

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## WALTERS v. DETROIT UNITED RY. CO.

(Supreme Court of Michigan, 1905. 139 Mich. 308, 102 N. W. 745.)

CARPENTER, J. On the 7th of April, 1903, plaintiffs purchased at the village of Trenton, Wayne county, certain furniture for a drug store. They placed that property in the custody of defendant's agent at Trenton, with instructions to ship the same over defendant's railway—defendant is a common carrier of merchandise—to them at Pontiac, Oakland county, on Friday, April 10th. Had the goods been sent as directed, they would, according to the usual custom, known to plaintiffs, have reached Pontiac on Saturday, the 11th, or Monday, the 13th, of April. The goods were in fact shipped on the 8th and arrived in Pontiac on the 9th. They were placed in defendant's warehouse, and were there destroyed by fire Tuesday, April 14th, before notice of their arrival was given to plaintiffs. Plaintiffs brought

[21] See, also, McMillan v. Michigan, etc., Co., 16 Mich. 79, 102–108, 127–130, 93 Am. Dec. 208 (1867); L., L. & G. R. Co. v. Maris, 16 Kan. 333 (1876); Railroad Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208 (1895).

"We think it is the true rule of the law as to baggage that has reached its final destination, that the railroad company must, upon its arrival, have it ready for delivery upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and that the owner must call for it within a reasonable time, and must use diligence in calling for and removing it. * * * We believe it to be the usual custom to deliver and receive baggage not only during what is called the business hours of the day, but upon the arrival of trains in the night, and at almost any hour of the night. The traveler is rarely willing, after arriving at his destination, to leave his baggage at a railroad depot, and the railroad companies are usually desirous to dispatch business, and be relieved from their responsibility. Hence immediate delivery is the rule as to the baggage; and the rule that has been applied to the receipt of freight, that it should arrive during the usual hours of business, and so that the consignee may have an opportunity during the hours of business to see and receive it, does not apply to baggage, which usually accompanies the traveler, and is required by him on arrival." Aldis, J., in Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646 (1863).

See, further, as to the cessation of strict liability for baggage, Hutchinson on Carriers, §§ 707–711; cases collected in 36 L. R. A. 781–788.

suit and recovered judgment upon the ground that defendant's liability as common carrier continued at the time the goods were destroyed. Defendant insists that a verdict should have been directed in its favor.

There was no evidence of defendant's negligence. If, at the time the goods were destroyed by fire, defendant continued to hold them under its responsibility as a common carrier (that is, as an insurer against all injuries except acts of God), it was liable. If it did not so hold them, it was not liable. Jurists have not agreed as to the obligation of a carrier who holds goods after transit, awaiting delivery. Respecting this question, "three distinct views have been taken:[22] First, that when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only; second, that merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business; third, that the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification." See opinion of Cooley, J., in McMillan v. M. S. & N. I. R. Co., 16 Mich. 102, 93 Am. Dec. 208. In this case Justice Christiancy concurred with Justice Cooley in holding that the view last stated was correct, while Chief Justice Martin concurred with Justice Campbell in holding that the view first stated was correct. In the subsequent case of Buckley v. Great Western Railway Co., 18 Mich. 121, a majority of the court, consisting of Justices Graves, Cooley, and Christiancy, concurred in holding that the liability of a common carrier continued a reasonable time after the goods were placed in the warehouse. There was no occasion for them to decide, and they did not decide, whether that reasonable time commenced to run at the time the goods were placed in the warehouse, or at the time notice was given to the consignee.

We are unable to find that this precise question has ever been determined by this court. It is necessary for us to determine it now. Without undertaking to repeat the arguments of Justice Cooley, which are familiar to all careful students of the Michigan Reports, it is sufficient to say that they are so clear and forceful that we have no hesitancy in declaring that the carrier's obligation continues until the lapse of a reasonable time after he has notified the consignee of the arrival of the goods. This conclusion disposes of the case, and results in an affirmance of the judgment.

[22] For the jurisdictions in which these views severally prevail, see Hutchinson on Carriers (3d Ed.) §§ 702, 704, 708; 6 Cyc. 457–459; Carriers, 9 Cent. Dig. §§ 316, 609, 609½; 4 Dec. Dig. § 140.

As to the duty of notifying the consignee, see ante, p. 143, note 10.

In stating this conclusion, we have not overlooked defendant's contention that the rule does not apply where, as in this case, plaintiffs knew the probable date of shipment, and the probable time of arrival of the goods. To insist that this circumstance exempts the carrier from liability is to deny the existence of the rule we have just declared. To be more precise, it is to insist that the second, and not the third, of the rules heretofore stated, is the correct one.

This is clearly shown by quoting from the opinion of Justice Cooley in McMillan v. M. S. & N. I. R. Co., supra: "The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand, ready to take it away when received." And the same learned jurist, in stating why that rule should be rejected, states a sufficient reason for denying the present contention of defendant: "To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him, without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice, than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points."

In support of its position, defendant cites several cases decided by courts who deny the rule declared to be law in this state. It is scarcely necessary to say that decisions of a court denying the rule afford no aid in construing it.

Judgment affirmed, with costs.

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## TEXAS & P. RY. CO. v. CLAYTON.

(Circuit Court of Appeals, Second Circuit, 1897. 84 Fed. 305, 28 C. C. A. 142.)

Action for loss by fire of cotton shipped over the line of defendant railway company under bills of lading which provided that the goods should be delivered at Liverpool, England, but that the railway's liability should be limited to its own line and its contract be fully performed upon delivery of the cotton to a connecting steamship line at New Orleans. Defendant carried the cotton to a wharf owned by it at Westwego, within the port of New Orleans. Further facts appear in the opinion.

WALLACE, J.[22] * * * The course of business between the defendant and the steamship line was as follows:

[22] The statement of facts is based upon facts stated in the original opinion. Parts of the original opinion are here omitted.

Upon the shipment of the cotton in Texas, bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant, and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego, a skeleton would be made out by the defendant's clerks at Westwego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill and the date of the making of the skeleton. When this skeleton had been made out and the car had been side-tracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were subdivided into 15 sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a "transfer sheet," containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line.

The steamship line, upon receiving the transfer sheet understood that cotton for their vessels was on the wharf at Westwego, and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company, when it was ready to take the cotton, would send the vessel with their stevedores to the wharf. The defendant's clerk would go with the master of the vessel, and identify and count out the particular lots of cotton designated for his vessel. The master would "O. K." them, and the stevedores would thereupon take the cotton, and put it on board the ship. Before the cotton left the wharf, the defendant would obtain a receipt for it from the master of the ship.

The particular cotton involved in this suit had arrived and been unloaded upon the wharf at Westwego prior to November 5th. The transfer sheets had been transmitted by the defendant to the steamship line prior to November 10th; and prior to November 12th the steamship line had returned the transfer sheets to the defendant. The fire occurred upon the evening of November 12th. In the forenoon of that day the defendant gave notice to the steamship line that the cotton was upon the wharf, and requested the latter to come and

remove it as soon as practicable. The fire took place without any fault or negligence on the part of the defendant.[24] * * *

The only question presented by the assignments of error is whether the trial judge correctly ruled that, upon the whole case, plaintiffs were entitled to recover. It was assumed by both parties, each having moved that a verdict be directed, that there was no disputed question of fact for the jury.

In the absence of a special contract qualifying the ordinary obligations of a common carrier, when goods are delivered to a railway company for transportation to a destination beyond its own line through the intervention of a connecting carrier, it is liable as an insurer of the goods until it has delivered them to the connecting carrier, or unless, by the refusal or inability of the connecting carrier to receive them, it is justified in storing them, and has taken the necessary steps to occupy the relation of a warehouseman. Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier. Goold v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

It was said by the court in Railroad Co. v. Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297, that: "The rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivering or attempting to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the end of the bailment. It is very clear that the simple depositing of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or

[24] When this case came before the Supreme Court, Harlan, J., said: "Counsel for the railway company correctly states that on the morning of the fire, and on other occasions prior thereto both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf ready for the steamship company to take away and made request that the same should be removed; that the attention of the officers of the steamship company was called to the amount of cotton on the wharf which they had contracted to carry, and they were requested to move it at the earliest possible moment and to comply with their contract; and that in reply they said, in substance, that their ships had been delayed, the principal cause being certain labor troubles then existing in New Orleans with employés of the steamship companies, and another cause being the bad weather. It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company."

modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them; but, if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them."

What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformably with usage created by the course of the business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * *

In Pratt v. Railway Co., 95 U. S. 43, 24 L. Ed. 336, the Michigan Central Railroad Company and the Grand Trunk Railroad Company used a freight depot of the former, and when goods were deposited by the latter in a certain part of the depot, destined over the road of the former, they were set apart by the employés of the latter; and, after they were so placed, the employés of the Grand Trunk Railway did not further handle them. After being so set apart, the Michigan Central Railroad Company would obtain from the Grand Trunk Railway Company a list describing the goods and their ultimate destination, and make out a waybill for their transportation over its own road. Certain goods which had been thus set apart for transportation over the line of the Michigan Central Railroad Company were burned before they were loaded into its cars, but after it had obtained the descriptive list. It was held that there had been a delivery by the Grand Trunk Railway Company to the Michigan Central Railroad Company. The court said: "No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded without further action of the Grand Trunk Company."

In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf, awaiting transportation by other steamship lines or vessels, further than by placing it, when unloaded from the cars, near certain numbered posts in the shed, where it might remain until called for, or might be removed by the defendant to some other location, to suit its own convenience. Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary.

There is no room for the contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity, and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it "as soon as practicable" was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire.

The bills of lading did not restrict the ordinary liability of a carrier who receives goods for a destination beyond its own line, for transportation by a connecting carrier. On the contrary, the contract between the parties was carefully framed to adjust the liability of the carriers as between themselves, and to protect the shipper, in the event of a disputable custody of the goods. By its terms, the carrier, and that carrier only, "in whose actual custody" the cotton should be, was to be liable for any loss or damage to it whereby any legal liability might be incurred. It was the manifest purpose of this provision to define the rights of the parties to the contract in the event of doubt or dispute, and to make that carrier liable only who was in actual custody of the goods at the time of the loss, irrespective of the question whether there had been any constructive change of possession between the two carriers previously.

A verdict for the plaintiffs was properly directed. The judgment is therefore affirmed.[25]

[25] Affirmed 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725 (1899). See, also, Bennitt v. Mo. Pac. Ry. Co., 46 Mo. App. 656 (1891); Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983 (1906).

"The general rule of law is that an intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee, without unreasonable delay, and store or otherwise take care of the goods while awaiting instructions. Having done this, the liability of the carrier as such will cease, and the liability of a warehouseman be substituted." Acheson, J., in Buston v. Pa. R. Co., 119 Fed. 808, 56 C. C. A. 320 (1903). And see Lesinsky v. Gt. W. Dis. Co., ante, p. 144. But compare Larimore v. Chicago, etc., R. Co., 65 Mo. App. 167 (1896).

For a carrier's liability for goods whose delivery has been countermanded, see Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527 (1902); St. Louis, etc., Co. v. Montgomery, ante, p. 486.

## DODGE v. BOSTON & B. S. S. CO.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.)

Tort against a common carrier for personal injuries. The plaintiff, a passenger by defendant's steamboat from Boston to Camden, left the boat on arrival at Rockland, an intermediate landing place, to get breakfast at a restaurant on the wharf. The part of the wharf where the steamboat lay was leased to defendant. The restaurant was at another part of the wharf, and was maintained by the owner of the wharf. Plaintiff left the steamboat at a gangway used for loading and discharging baggage and cargo, and not intended for passengers. He made his exit over a plank which had been run out from the vessel to an inclined slip which formed part of the wharf, and had left the plank and got two-thirds of the way up the slip, when he was struck by a larger gang plank which defendant's servants were bringing down the slip. Thereby he received the injury for which he sued. Plaintiff might have had breakfast on board the boat. There was a safe means of egress to the wharf for passengers, which plaintiff might have used. Plaintiff had a verdict. The case came up on exceptions to instructions which appear in the opinion.

KNOWLTON, J.[26] This case presents an important question as to the rights and duties of passengers and common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the con-

[26] The statement of facts has been rewritten. Parts of the opinion are omitted.

tinuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight-house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time; and this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments. Peniston v. Chicago, etc., R. R., 34 La. Ann. 777, 44 Am. R. 444; Jeffersonville, etc., R. R. v. Riley, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop, he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey, he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is: What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend. may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over a railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped for two

hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. * * *

Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff, as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other. * * *

It may be assumed that the plaintiff would have ceased for the time to be a passenger, if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused. For, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in Moreland v. Boston, etc., R. R., 141 Mass. 31, 6 N. E. 225, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed, that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway, which was in fact used by the plaintiff, for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and, upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his

safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.

This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law. Ellis v. Narragansett Steamship Co., 111 Mass. 146; Pennsylvania R. R. v. Zebe, 33 Pa. 318; McDonald v. Chicago, etc., R. R., 26 Iowa, 124, 142, 96 Am. Dec. 114; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716. We are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if by the word "notified," in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request.

No instructions were given upon this subject, and because of this error the entry must be, exceptions sustained.[27]

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## CREAMER v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456.)

BARKER, J.[28] The plaintiff's intestate was instantly killed on Warren street by an electric car, which, it was testified, was running at a speed of 15 miles an hour. His death, under such circumstances, gave the plaintiff a right to maintain the action under St. 1886, c. 140, if, when killed, he was a passenger, or if, not being a passenger, he was

[27] Acc. Ala., etc., Ry. Co. v. Coggins, 88 Fed. 455, 32 C. C. A. 1 (1898), passenger going to inquire for telegram; Galveston, etc., Ry. Co. v. Mathes (Tex. Civ. App.) 73 S. W. 411 (1903), passenger in act of alighting at intermediate station; Hrebrik v. Carr (D. C.) 29 Fed. 298 (1886), leaving steamboat by gangplank to buy tobacco. Compare Chicago, etc., R. Co. v. Sattler, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666 (1902), getting off train stopped on siding.

In Zeccardi v. Yonkers, etc., R. Co., 113 App. Div. 649, 99 N. Y. Supp. 936 (1906), a conductor ejected a passenger and assaulted him in the street. Plaintiff, a fellow passenger, left the car to stop the fight, and was assaulted by the motorman. In an action against the carrier for the motorman's assault, it was held to be error to dismiss the case. The court said: "By stepping off the car to stop the battery, he no more ceases to be a passenger than if he stepped off to pick up his hat or take a drink of water."

Compare Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425 (1888), where a street railway company was held not to be liable for a conductor's assault on one who, without evincing his intention to return, had temporarily left the car to make a complaint against the conductor.

[28] Parts of the opinion are omitted.

in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck he was walking across Warren street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street.

We are of the opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. Warren v. Railroad Co., 8 Allen, 227, 85 Am. Dec. 700; McKimble v. Railroad Co., 139 Mass. 542, 2 N. E. 97; Dodge v. Steamship Co. [ante, p. 517]. But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.

The plaintiff, therefore, cannot recover unless she shows by affirmative evidence that the deceased was in the exercise of due diligence to avoid injury in traveling upon the street. * * *

Before the car actually stopped, and when the deceased was within 5 or 10 feet of the crosswalk, he rose from his seat, and immediately stepped off the car, at right angles to the left. His car had slowed up, but was still in motion when he left it; and he stepped in front of another car going northerly upon the other track, and was instantly killed. The car on which he had been riding came to a stop a few feet farther on. The car which struck him was coming down hill, and was moving at a speed of 15 miles an hour. * * *

We do not, of course, hold that it is, as a matter of law, negligent for one to leave a street car while it is in motion, or to attempt to cross a street car track without looking to see whether a car is approaching; but neither of these acts is evidence of due care, and we cannot discover in the testimony reported any evidence that the deceased exercised care or attention of any kind or degree. On the

contrary, the undisputed evidence shows that, in spite of warnings from those in his immediate vicinity, he suddenly, without precaution, precipitated himself into a position of great and obvious danger. He no doubt had a right to expect that any cars which might be upon the other track would not run at a dangerous rate of speed, and would be lawfully managed; but this expectation could not excuse him from the exercise of all proper care, and does not relieve the plaintiff from the obligation of proving, by positive affirmative evidence, that the deceased was in fact in the exercise of due diligence. As there was no such evidence, a verdict for the defendant was rightly ordered.

Judgment on the verdict.[39]

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## BRUNSWICK & W. RY. CO. v. MOORE.

**(Supreme Court of Georgia, 1897. 101 Ga. 684, 28 S. E. 1000.)**

ATKINSON, J.[40] The questions made in this case arose upon the following state of facts: Aaron Moore, as next friend of his son William, sued the railroad company, and obtained a verdict for $3,000. Defendant made a motion for a new trial, which being overruled, it excepted. The material testimony introduced upon the trial may be stated as follows: William Moore testified that he was 17 years of age; that he and eight other boys entered defendant's train at Alapaha, and traveled thereon as passengers to Willacoochee, a distance of 11 miles, on the night of February 9, 1896. The train stopped at Willacoochee not more than four or five seconds, just long enough for Moore to leave it. He had just reached the ground, and taken two steps, when a shot from a pistol, fired by the conductor of the train, struck him in the leg. * * *

If he were a passenger at the time the injuries were inflicted upon him for which he brings this action, he was entitled to recover, for he is entitled, by virtue of his contract of passenger carriage, not only to be protected against the consequences of the negligent acts of the company's agents, resulting from the omission to perform its duties towards the passenger, but he is likewise entitled to be protected against the wanton and willful acts of violence wrongfully committed upon his person by the servants of the company during the continuance of the relation instituted by his contract with the company. Whether or not he was a passenger at the time the injuries were inflicted upon him depends upon whether, at that time, it had

[39] Acc. Indianapolis, etc., Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044 (1903); Hanson v. Urbana & C. R. Co., 75 Ill. App. 474 (1898); Street R. R. v. Boddy, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885 (1900). Compare Atlanta, etc., Co. v. Bates, 103 Ga. 333, 30 S. E. 41 (1898).

[40] Part of the opinion has been omitted.

completed its contract of carriage with him, and, in the legal sense, delivered him at the point of destination. There was no voluntary abandonment by this passenger of his right safely to be delivered at the point of destination in accordance with the contract under which he entered the company's cars. Its servants did not, for any improper conduct upon his part, seek to expel him from the car, and thus terminate the relation of carrier and passenger; so that the relation of carrier and passenger, having commenced, continued until the carrier had fully performed its contract of carriage.

It does not satisfy the requirements of this contract that the passenger should have been safely transported to the point at which he was expected to, and did, leave the car of the company. Until he had actually left, or had had a reasonable time within which to leave, the premises of the company at the point of destination, he was still a passenger, and entitled, as against the company, to all the rights and immunities of a passenger.[81] This was the rule laid down by the court in its instruction to the jury. It was the correct rule, and consequently this instruction afforded no ground for the granting of a new trial. 2 Am. & Eng. Enc. Law, p. 745, and cases there cited; 4 Elliott, R. R. § 1592. Whether or not the plaintiff's version of this transaction was true was a question of fact for the jury. They believed it, returned a verdict in his favor, and the trial judge has approved their finding. It is amply supported by the evidence. In view

[81] Acc. Houston, etc., Co. v. Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981 (1903), passenger assaulted on station platform; So. Ry. Co. v. Nelson, 148 Ala. 88, 41 South. 1006 (1906), arrested at station for alleged failure to pay fare; McKimble v. B. & M. R. Co., 141 Mass. 463, 5 N. E. 804 (1886), leaving train on side away from station and crossing track; Chicago, etc., R. Co. v. Tracey, 109 Ill. App. 563 (1903), same point; Pa. Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713 (1898), semble, passenger leaving train stopped at crossing of public street and attempting to cross track; Chesapeake, etc., R. Co. v. King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102 (1900), alighting and crossing track. Compare Allerton v. B. & M. R. Co., 146 Mass. 241, 15 N. E. 621 (1888), crossing track in public street; Pittsburgh, etc., Ry. Co. v. Krouse, 30 Ohio St. 222 (1876), re-entering train in search of conductor; Hendrick v. Chicago, etc., R. Co., 136 Mo. 548, 38 S. W. 297 (1896), walking down station platform to speak to engineer; St. Louis, etc., Ry. Co. v. Beecher, 65 Ark. 64, 44 S. W. 715 (1898), walking home on railroad track; Krantz v. Rio Grande, etc., Co., 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297 (1895), peddler preparing to sell wares at station; Finnegan v. Chicago, etc., Co., 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399 (1892), person leaving train he has taken by mistake, and walking at the direction of the conductor along the track at a place not designed for passengers to take his proper train; King v. Cent. of Ga. Ry. Co., 107 Ga. 754, 33 S. E. 839 (1899), person waiting midway on his journey for connecting train, who crossed carrier's premises at place intended for passengers, on his way from hotel to shop, and not for purpose of taking train.

"When appellant left the train, appellee owed him no duty except to give him a safe way in which to leave the premises of the railway company, and if he returned to the train after having once disembarked therefrom, for the purpose of using it as a mode of crossing to the other side of the track, he was a trespasser, and appellant owed him no duty, except not to hurt him, if it discovered him in a place of peril." Fly, J., in Ratteree v. Galveston, etc., Ry. Co., 36 Tex. Civ. App. 197, 81 S. W. 566 (1904).

of the circumstances under which the injury occurred, the nature of the wounds inflicted, it was not excessive, and this court will not control the discretion of the trial judge in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

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## St. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BRYANT.

(Court of Civil Appeals of Texas, 1906. 92 S. W. 813.)

Action for personal injury alleged to have been received through the negligence of defendant railroad company in starting its train as plaintiff, a passenger, was in the act of alighting at the station of his destination. There was evidence that plaintiff, when getting off the train, stopped for some time upon the platform of a car to buy a paper of a newsboy there, and that the car had moved 15 or 20 feet when he stepped off with grips in his hand. Plaintiff had a verdict and judgment. Defendant appeals.

TALBOT, J.[82] * * * Complaint is made of the court's action in refusing to give appellant's requested instruction which reads as follows: "If you believe from the evidence that the employés of defendant stopped the train at Chandler a reasonably sufficient time for a passenger situated as was plaintiff to depart therefrom, and if you should further believe that the plaintiff delayed getting off said train from any cause, and that this delay, if any, was unknown to defendant, then you are charged that his contract relation with defendant ceased at the expiration of such reasonable time, if any, and the defendant could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon plaintiff." The refusal to give this charge was error for which the judgment must be reversed and the cause remanded for a new trial.[83] * * *

[82] The statement of facts is based upon facts stated in the opinion. Parts of the opinion are omitted.

[83] Acc. Chicago, etc., Co. v. Frazer, 55 Kan. 582, 40 Pac. 923 (1895); Heinlein v. B. & P. R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676 (1888), loitering at station; Glenn v. L. E. & W. R. Co., 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255 (1905), loitering at station; Hudson v. Lynn & B. R. Co., 185 Mass. 510, 71 N. E. 66 (1904), carrier unable to collect fare because passenger in a stupor. Compare Doran v. East River Ferry Co., 3 Lans. (N. Y.) 105 (1870), remaining on board throughout return trip without demand or payment of return fare; Bass v. Cleveland, etc., Ry. Co., 142 Mich. 177, 105 N. W. 151, 2 L. R. A. (N. S.) 875 (1905), sleeping passenger not awakened by carrier; Chicago, etc., R. Co. v. Wood, 104 Fed. 663, 44 C. C. A. 118 (1900), passenger intending to stay in station longer than he would be entitled to stay. For the status of a person changing cars at a union station of connecting carriers, see Davis v. Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844 (1900).

# PART V

# THE COMMON CARRIER'S DUTY TO SERVE

## CHAPTER I

## EXTENT OF OBLIGATION TO SERVE

### BENNETT v. DUTTON.

(Superior Court of Judicature of New Hampshire, 1839. 10 N. H. 481.)

Case for refusing to receive plaintiff as a passenger in defendant's coach. The evidence showed that rival lines of daily stages were run from Lowell to Nashua, one of which, operated by French, ran in connection with defendant's line, which extended from Nashua to Amherst and beyond; the two lines by agreement between their proprietors forming a through route for the carriage of passengers and mail. The contract with the government for the carriage of mail required that connecting coaches forming a mail route should give preference to each other's passengers. Defendant had further agreed with French not to carry on the same day that he arrived any passenger who came from Lowell to Nashua by the rival line. The plaintiff took the rival line at Lowell, though he had been notified that if he did so defendant would not receive him that day as a passenger. As soon as he reached Nashua, plaintiff applied to be received into defendant's coach, and tendered the fare to Amherst. There was room in the conveyance, but defendant refused to receive him. The parties agreed that judgment should be rendered for the plaintiff, for nominal damages, or for the defendant, according to the opinion of the court upon the facts.

PARKER, C. J.[1] It is well settled that, so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailments, 328; Riley v. Horne, 5 Bing. 217, 15 Eng. C. L. R. 426. * * *

And we are of opinion that the proprietors of a stagecoach, for the regular transportation of passengers, for hire, from place to place,

[1] The statement of facts has been rewritten, and part of the opinion omitted.

are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Hollister v. Nowlen, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stagecoach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach; and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua, in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case, or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell, and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided, in New York, that stagecoach proprietors are answerable, as common carriers, for the baggage of passengers; that they cannot restrict their common-law liability by a general notice that the baggage of passengers is at the risk of the owners; and that if a carrier can restrict his common-law liability it can only be by an express contract. Hollister v. Nowlen [ante, p. 395]. And this prin-

ciple was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance.

The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished, because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.[2]

[2] See, also, Jackson v. Rogers, ante, p. 16; Holt, C. J., in Lane v. Cotton, ante, p. 16; Doty v. Strong, 1 Pin. (Wis.) 313, 40 Am. Dec. 773 (1843), assumpsit lies for refusal of goods tendered; Chicago, etc., R. Co. v. Wollcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320 (1895), railroad company, which holds itself out to do so, is bound to furnish through cars for carriage to points beyond its line; Crouch v. London & N. W. Ry. Co., 14 C. B. 255 (1854), must carry, though destination is beyond the realm; Tunnel v. Pettijohn, 2 Har. (Del.) 48 (1836), truckman carrying light goods not bound to take hogshead of molasses; Rutherford v. Gd. Tk. Ry. (Can.) 5 La. Rev. Leg. 483 (1873), railroad carrying lumber may except cedar; Little Rock, etc., R. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057 (1896), railroad, though lacking facilities to carry, not liable unless goods are tendered; Central, etc., R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457 (1887), carrier liable where its statement that it would not carry caused plaintiff to desist from selling his goods for shipment; Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41 (1891), where carrier, without reference to any specific intended shipment, told shipper it would carry for him no longer, and shipper in consequence made no tender of goods he would otherwise have shipped, carrier not liable for breach of duty to receive.

"The defendant constructed its railway and equipped it. Plaintiff then opened his coal mine, and constructed his sidings, chutes, and tipples with a view to shipment on this road and no other. Defendant up to November 19, 1902, furnished him with cars. Then it peremptorily refused to perform its duty to him unless he sold his coal to another coal company at a price much

## EXPRESS CASES.

(Supreme Court of the United States, 1886. 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791.)

WAITE, C. J.[3] These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. * * * The evidence shows that the express business was first organized in the United States about the year 1839. * * *

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States * * * has ever refused to transport express matter for the public, upon the application of some express company of some form of legal constitution. Every railway company * * * has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they

below what it was worth; this latter company being controlled by the president of the railroad company. If this was not a wrong special to plaintiff, as distinguished from the public, we are at a loss to conceive what would constitute such a wrong. It is not a refusal to supply cars and motive power on the road, or to keep the road in repair. * * * We are of opinion that on the particular facts of this case, not disputed by defendant, plaintiff's injury was different in kind and special to himself, and that therefore he could properly seek the remedy by mandamus." Dean, J., in Loraine v. Pittsburg, etc., R. Co., 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502 (1903).

"While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed, which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fé track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer, it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission or other administrative board, was necessary; for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Brewer, J., in Mo. Pac. Ry. v. Larabee Mills, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352 (1909).

[3] Parts of the opinion are omitted. Miller, J., delivered a dissenting opinion, with which Field, J., agreed.

needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. * * *

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger.

The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which

is allotted to a particular carrier must be, in a measure, under his exclusive control.

No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. * * *

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express com-

panies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The Constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas & Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the states of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable.

The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding,

and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. * * *

The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.[4]

[4] Acc. Sargent v. Boston & L. R. Co., 115 Mass. 416 (1874); Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886); Atlantic Ex. Co. v. Wilmington & W. R. Co., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805 (1892). And see No. Pac. Ry. Co. v. Adams, ante, p. 451, and cases cited in note thereto.

Contra: Sandford v. Railroad Co., 24 Pa. 387, 64 Am. Dec. 667 (1855); New Eng. Ex. Co. v. Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31 (1869); McDuffee v. P. & R. Co., 52 N. H. 430, 13 Am. Rep. 72 (1873). And see 17 Green Bag, 570.

In Chicago, etc., R. Co. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97 (1891) a question arose as to the validity of a contract giving the Pullman Company an exclusive right to run sleeping cars over the railroad. Harlan, J., said: "The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied

## STATE v. REED.

(Supreme Court of Mississippi, 1898. 76 Miss. 211, 24 South. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528.)

WOODS, C. J.[5] Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railway Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was by the judgment of that court acquitted of the charge and discharged. From this judgment of the circuit court, the state prosecutes this appeal. * * *

The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. * * * The single issue is thus sharply defined, viz.: Has a railroad the right to confer upon one hackman the exclusive privilege of entering with his hacks its inclosed station-house grounds, and of soliciting incoming passengers, and to exclude all others from the inclosure, such privilege conferring advantages upon the favored hackman, and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded 150 feet from the depot, and in an open street?

The question has never before been presented in our courts, but it is by no means a new one, and has been passed upon in other jurisdictions. Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds, yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchandise, and at the same time exclude all others. The question is one that affects not only the excluded hackmen; it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers be-

with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them."

See, also, Del., L. & W. R. R. v. Kutter, 147 Fed. 51, 77 C. C. A. 315 (1906), contract for exclusive right to carry milk.

[5] Parts of the opinion are omitted.

yond its own lines, and in the end to create a monopoly of such business, not granted by its charter, and against the interests of the public. * * *

We are of opinion that the railroad had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.[6]

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## ILLINOIS CENT. R. CO. v. ALLEN.

(Court of Appeals of Kentucky, 1905. 121 Ky. 138, 89 S. W. 150.)

BARKER, J.[7] * * * We will consider, first, the duty of common carriers of passengers in regard to persons applying for transportation who are, or appear to be, unable to care for themselves. May a lunatic have a ticket thrust into his hand, and be delivered to the employés of a railroad corporation to be transported to his destina-

[6] Acc. Montana Union Ry. Co. v. Langlois, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745 (1890); Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106 (1890); Kalamazoo, etc., Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 698 (1890); McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 (1892); Indianapolis, etc., Co. v. Dohn, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274 (1899). And see Pa. Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223 (1899), right to stand in public street outside station; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837), entering inn to solicit custom of guests.

Contra: Old Col. R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661 (1888); Boston & A. R. Co. v. Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418 (1900); Brown v. N. Y. C. R. Co., 75 Hun, 355, 27 N. Y. Supp. 69 (1894), affirmed 151 N. Y. 674, 46 N. E. 1145 (1897); N. Y., N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159 (1898); Norfolk & W. Ry. Co. v. Old Dom. Baggage Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722 (1901); N. Y., N. H. & H. R. Co. v. Bork, 23 R. I. 218, 49 Atl. 965 (1901); Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811 (1903); Donovan v. Pa. Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192 (1905); State v. Union Depot Co., 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792 (1905); Oregon Short Line v. Davidson, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777 (1908); Union Depot Co. v. Meeking (Colo.) 94 Pac. 16 (1908). And see Kates v. Atlanta, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1899), and Godbout v. St. Paul Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532 (1900), soliciting within station building; Perth Station v. Ross, [1897] App. Cas. 479, railroad maintaining hotel at station may exclude from station solicitors for other hotels; Telephone Case, 3 Can. Ry. Cas. 205 (1904); 17 Green Bag, 575, railroad which permits one telephone company to have a booth at its station is not bound to admit a rival company to a like privilege; Atlanta Ter. Co. v. Am. Baggage, etc., Co., 125 Ga. 677, 54 S. E. 711 (1906).

Where an arriving passenger has asked a hackman to meet and take him from the station, his request is authority to the hackman to enter the station grounds, though against the railroad's orders, and the hackman is not liable for trespass. Griswold v. Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302 (1889). Contra: Barker v. Midland Ry. Co., 18 C. B. 46 (1856).

A railroad cannot confer a monopoly of using its terminal docks upon a single line of steamers. West Coast Naval Stores Co. v. L. & N. R. Co., 121 Fed. 645, 57 C. C. A. 671 (1903).

[7] Parts of the opinion are omitted.

tion, and cared for by them on the journey? May one known to be intoxicated be imposed upon the employés of a common carrier without an attendant to care for him? Or may an old blind man demand that the corporation shall receive him as a passenger without an attendant, in order to make a long journey involving certainly two, and perhaps three, changes of cars? The answer to these questions is manifestly fraught with important consequences to carriers of passengers for hire. * * *

We think it a proposition too obvious to admit of refutation that the blind man who, without an attendant, successfully makes a long railroad journey involving several changes of cars, does so either because he is especially cared for and helped on his way by the kindness of chance acquaintances or by the aid of the employés of the carrier. Let any one imagine a totally blind man alighting on a strange platform for the purpose of changing cars amid the confusion arising from the shifting of trains, the blowing of whistles, the clanging of bells, the rolling of baggage trucks, and the hurried tramp of the feet of his fellow passengers, and he will need no extraneous evidence to realize that the afflicted passenger will be totally helpless, as well as in the most imminent danger of harm, without the kindly aid of some one who is not devoid of sight. The duty of the carrier of passengers for hire is to attend to the comfort and safety of all of its passengers alike, but not to furnish especial attention to any one in particular, unless, perhaps, under exceptional circumstances, such as accidental sickness or misfortune en route. If the carrier accepts a helpless passenger without an attendant, it will doubtless assume the additional care and responsibility commensurate with his misfortune and needs; but this is a burden it must assume for itself. The law does not impose it as an incident to the business.[8]

The undisputed facts of the case at bar are that the appellee was, as already said, totally blind and 77 years of age. He desired to be transported for a distance of from 140 to 185 miles (depending upon which of two routes he took), involving two, if not three, changes of the vehicles of transportation; one of the changes being to take a steamboat ride of 20 miles up the Ohio river. On both occasions that he came to the appellant's agent in regard to the proposed trip he was led by an attendant, and under these circumstances the agent firmly, but politely, refused to sell him a ticket unless he had an attendant. We think it entirely immaterial that appellee was in the habit of taking occasional short trips on appellant's road without an attendant. These involved no change of cars, and furnish no evidence of his ability to take the trip under contemplation. But we think appellee's own evidence abundantly shows that he was dependent upon the assistance of others even on these short trips. * * *

We do not think it important that the appellant had promulgated a

[8] But see Atchison, etc., Ry. Co. v. Parry, ante, p. 82, and note thereto.

rule upon the question in hand, although, if it were, the existence of the rule was established without contradiction. The rule at best is only for the guidance of the employés. The corporation could not limit its duties and responsibilities to the public by an edict to its servants; and, unless the justifying principle of law be underneath it, the rule is void. The right of the company to protect itself from the additional hazard of transporting a blind man on a (considering his infirmity) to him perilous journey does not rest on a rule of its own, but on a controlling principle of law. It follows, from the view we have taken of the law of the case, that a peremptory instruction should have been awarded appellant at the conclusion of the testimony, and that it is unnecessary to review the other interesting questions raised by appellant on the record.

Wherefore the judgment is reversed, for proceedings consistent with this opinion.[*]

[*] See, also, Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983 (1906), need not receive goods, though from connecting road, if impending flood threatens their destruction; Phillips v. So. Ry. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163 (1899), need not admit to station at 8 p. m. one who intends to take train leaving at 1:30 a. m.; Platt v. Lecocq, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558 (1907), though the only train carrying express matter leaves before business hours in the morning, an express company is not bound to receive a shipment of money from a bank on the preceding afternoon; Danciger v. Wells Fargo & Co., 154 Fed. 379 (1907), not bound to take goods C. O. D., though accustomed to do so. Compare I. C. R. Co. v. Smith, 85 Miss. 349, 37 South. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293 (1905), railroad must receive passenger, though blind, if it should know he can take care of himself.

It has been held: That a common carrier may refuse to accept as passenger a cursing lunatic, though irresponsible for his behavior and under guard, Owens v. Macon, etc., R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946 (1903); a person who, being drunk, will, it is reasonably believed, behave offensively, Vinton v. Middlesex R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 714 (1865); Louisville & E. R. Co. v. McNally, 105 S. W. 124, 31 Ky. Law Rep. 1357 (1907); or, it seems, a gambler reasonably believed to purpose plying his trade on the train, Thurston v. Union Pac. R. Co., 4 Dill. 321, Fed. Cas. No. 14,019 (1877); that it may not refuse to accept one who is sober, simply because he has been disorderly on the cars on previous occasions when drunk, Story v. N. & S. R. Co., 133 N. C. 59, 45 S. E. 349 (1903); that it may refuse a woman whose accustomed behavior on the cars has been offensive and vulgar, and who will not promise to behave properly, Stevenson v. West Seattle, etc., Co., 22 Wash. 84, 60 Pac. 51 (1900); but not, because of her immoral character, a woman whose conduct on the train is proper, Brown v. M. & C. R. Co. (C. C.) 7 Fed. 51 (1881). And see cases cited in note, ante, p. 81.

It seems a carrier may refuse transportation illegal for the passenger. Pearson v. Duane, 4 Wall. 605, 18 L. Ed. 447 (1866). As to transportation illegal for the carrier, see Esposito v. Bowden, ante, p. 116.

In California Powder Works v. Atl. & Pac. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648 (1896), an agreement exempting a common carrier from loss without fault of a shipment of gunpowder was held valid, though the carrier offered no other terms of carriage, on the ground that it was not bound to carry at all. The court said: "A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles, as nitro-glycerine, dynamite, gunpowder, aqua fortis, oil of vitriol, matches, etc. * * * It was thus optional with the defendant to accept the powder for

## BARNEY v. THE D. R. MARTIN.

(Circuit Court, E. D. New York, 1873. 11 Blatchf. 233, Fed. Cas. No. 1,030.)

HUNT, Circuit Judge.[10] On the trial before the district judge, the libelant recovered the sum of $1,000, as his damages, for ejecting him from the boat, on the morning of October 23, 1871. On an application subsequently made to him, the district judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libelant was pursuing his business as an express agent on board the boat; that he persisted in it against the remonstrance of the claimants; and that it was to prevent the transaction of that business by him on board the boat, that he was ejected therefrom by the claimants. * * *

The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish traveling conveyances for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their cars for such purposes. This seems to be clear both upon principle and authority. * * *

The incidental benefit arising from the transaction of such business as may be done on board a boat or a car belongs to the carrier, and he can allow the privilege to one and exclude it from another at his pleasure. A steamboat company or a railroad company may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulations, and the business interferes in no respect with the orderly management of the vehicle. But, if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and the good management would soon be at end. * * *

The libelant in this case refused to give any intimation that he would abandon his trade on board the vessel. The steamboat com-

transportation or not; but, if it chose to accept it, it could do so upon such terms, and with such limitation of its common-law liability, as it saw fit." See, also, Boyd v. Moses, 7 Wall. 316, 19 L. Ed. 192 (1868), carrier not bound under contract to carry "lawful merchandise" to receive goods in such condition that they will damage other cargo; Nobel's Explosives Co. v. Jenkins, ante, p. 116 note; Wilson v. Atl. Coast Line (C. C.) 129 Fed. 774 (1904), not bound to carry menagerie without release of liability; People v. Babcock, 16 Hun (N. Y.) 313 (1878), nor fragile glass without limitation of liability; Crescent Liquor Co. v. Platt (C. C.) 148 Fed. 894 (1906), express company must carry intoxicating liquor C. O. D., if it so carries other goods; Burke v. Platt (C. C.) 172 Fed. 777 (1909), but need not do so, if such carriage is peculiarly burdensome.

[10] Parts of the opinion are omitted.

pany, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit: his removal from the boat. This was done with no unnecessary force, and accompanied by no indignity.

In my opinion, the removal was justified, and the decree must be reversed.[11]

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## JOHNSON v. DOMINION EXPRESS CO.

(High Court of Justice for Ontario, 1896. 28 Ont. 203.)

Action to compel defendant to carry goods tendered to it, and for damages for refusing to carry. Defendant was an express company doing business under a contract with the Canadian Pacific Railway Company over the railway's lines. It charged a lower rate per pound for large parcels than for small ones. Plaintiffs planned to establish a business of collecting small parcels, putting them together into large parcels, and shipping them by the defendant company to a point of distribution at the lower rate, and thus to take from defendant its business of carrying small parcels.

ROSE, J.[12] * * * It seems to me that the question comes simply down to this: Did the defendant company hold itself out as a carrier to carry goods for persons in the position of the plaintiffs, and for the purposes for which the plaintiffs desired them to be carried? and, secondly, if it did, does the tariff rate or rates charged to others, on the evidence before me, establish that the amount tendered by the plaintiffs was a reasonable amount, or that the defendant company might not well charge for each parcel in a packed parcel according to its usual rates?

I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs; but I say I do not think the defendant ever intended to hold itself out to the public as the carrier of the goods of a rival express company, making use of it's credit and its facilities for doing business, to the aggrandizement of its rival and its own destruction. * * *

In my opinion, the action should be dismissed, with costs.

[11] Compare So. Fla. R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633, 3 L. R. A. 733, 23 Am. St. Rep. 506 (1889), employé of competing line wearing its uniform; Ford v. East La. R. Co., 110 La. 414, 34 South. 585 (1903), passenger whose business was "scalping" the carrier's nontransferable tickets.

[12] The statement of facts has been rewritten, and parts of the opinion omitted.

## GALENA & C. U. R. CO. v. RAE.

(Supreme Court of Illinois, 1857. 18 Ill. 488, 68 Am. Dec. 574.)

SKINNER, J.[13] This was an action on the case against the railroad company, as common carriers, for refusal to carry, and for delay in carrying, the grain of the plaintiff below from Rockford to Chicago. The cause was tried by jury, who returned a verdict of $4,950 against the company, upon which the court rendered judgment, refusing to grant a new trial.

The evidence is very voluminous, and, in the opinion of the court, is insufficient to sustain a verdict for the amount found. * * * As the cause will be again for trial, we will state those rules of law in controversy which are material to the case made by the record. * * *

It was incumbent on the plaintiff below to prove a tender of the customary price of carrying the grain offered to be shipped, or a readiness and willingness to pay according to the course and usage of the company in such case. The company should have a lien upon the grain carried for reasonable charges, and could withhold the same from delivery until paid. A readiness and willingness to pay the reasonable charges for carrying, according to the usage of the company, would be sufficient to impose the obligation to carry, unless the company required prepayment, and then the plaintiff would be required to offer and be ready to pay accordingly. Slight evidence, however, of readiness and willingness to pay would be sufficient, and they may be presumed or inferred from surrounding circumstances tending to raise such presumption.[14] * * * Judgment reversed.

[13] Parts of the opinion are omitted.

[14] A common carrier may require prepayment of fare. A passenger, who after reasonable opportunity fails to comply with a demand for payment of fare, forfeits his right to be carried, and a tender after steps have been taken to stop the train to put him off is of no avail. Asmore v. So. & Fla. R. Co., 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53 (1892).

## CHAPTER II

## ADEQUACY OF SERVICE

### BRANCH v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina, 1877. 77 N. C. 347.)

On the 10th of October, 1876, the plaintiff delivered to defendant company, at its depot in the town of Black Creek, Wilson county, thirty-one bales of cotton, to be shipped to Norfolk, Virginia, and at the same time the defendant gave to the plaintiff a bill of lading for the cotton, signed by the agent of the company. * * * The cotton was shipped on the morning of the 19th of October, 1876.

The defendant owned a large number of cars and engines—more than sufficient for the ordinary freight business—but during the season of 1876 there was a great press of business for about six weeks in transporting through cotton from Wilmington to the Northern markets, which amounted to 4,200 bales during the said month. The cars were used for the shipment of this freight, a large quantity of which was detained in Wilmington, owing to the inability of the company to afford more speedy transportation. There was considerable competition between different roads for this class of business. The gauge of the road south of Wilmington, from which the cotton was received, is different from that of the defendant's road, which rendered it necessary to break bulk at Wilmington. The gauge of the roads north of Weldon is the same as that of defendant's road, and the defendant could have obtained from the North a sufficient number of cars for the transportation of all its freight, both local and through.

Upon the foregoing facts found by his honor, a jury trial having been waived, there was judgment that the plaintiff recover of the defendant the sum of $100 and costs, and the defendant appealed.

RODMAN, J.[1] * * * The Legislature considered the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interests of local shippers, for whose interest principally the road was built, and against whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage in order that the company might obtain the carriage from points where there were competing lines by land or water—as from Wilmington or Augusta. It declared, therefore, that the maximum of delay should be five days after a receipt for carriage, and imposed a penalty for every day's delay beyond. The act does not supersede or alter the duty or liability of the company at common law. The

[1] Parts of the statement of facts and of the opinion are omitted.

penalty in the case provided for is superadded. The act merely enforces an admitted duty.

2. Having seen that the company was prima facie liable, we proceed to consider its excuse. It is unnecessary to consider whether any excuse short of "an act of God, or of the king's enemies," would suffice. 1 Pars. Shipping, 314. We concur with the judge that the excuse offered was insufficient.

A common carrier (especially one having a monopoly of the carriage), who invites the public custom, is bound to provide sufficient power and vehicles to carry all the goods which his invitation naturally brings to him. The quantity of local freight he can foresee with approximate accuracy, and his first duty is to provide for that. If, in consequence of special inducements held out by him, the amount of freight from distant and foreign points, or through freights, which may not be a matter of certain calculation, is unexpectedly large, he is not at liberty to delay and injure the local shippers, whose wants he foreknew and was bound to provide for; but he must rather reject the distant freight, at the risk of breaking his promise and incurring damages to those shippers, because the quantity of their freight he could not foresee, and was, therefore, bound absolutely to provide for only by his own voluntary promise, and not by a duty imposed by the common law.

That the defendant did not have a sufficiency of cars in which to carry plaintiff's cotton cannot be deemed a legal excuse, when it is seen that the deficiency was in consequence of it's own acts in inducing large shipments from points beyond its Southern terminus.

The effect of these inducements it was bound to foresee and provide for. If a railroad should advertise that on a certain day it would take all persons, say from Raleigh to Charlotte, on it's regular passenger train at half price, and its cars should in consequence be filled, it would not excuse it in excluding any local passenger. Its duty was to provide accommodation for the extraordinary passengers *in addition* to the necessary accommodation of its usual local travel, and not *to the exclusion* of such travelers.

We can cite no case in which the question we have been considering has been made; but our conclusion seems just and reasonable.

A delay of local shipments, caused by a lack of cars, which lack is caused by a pressure of through freight, caused by inducements held out by railroad companies, was the very evil which the Act of 1874–75 undertook to remedy; and if such an excuse is admitted, the act is a dead letter, and we shall continue to see farmers, whose taxes built the roads, carrying their crops to market in ox carts along the sides of the railroads.

3. It appears, however, that the defendant company could have gotten additional cars from the North, and it does not appear that they could not have been gotten by ordinary diligence.

A railroad company is bound at common law, independently of any

statute, to use at least ordinary diligence in procuring a sufficiency of cars to carry all the freight tendered it, and certainly all that is accepted by it for shipment. * * * The statute only added a penalty for the neglect to perform the duty after a certain time.[2] * * *

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## BAKER v. BOSTON & M. R. CO.

**(Supreme Court of New Hampshire, 1906. 74 N. H. 100, 65 Atl. 386, 124 Am. St. Rep. 937.)**

Case for negligence. Transferred from the superior court. The questions of law are raised by the plaintiff's demurrer to the plea.

BINGHAM, J.[3] The defendants are engaged in the carrying trade as common carriers of freight and passengers. Whiting & Sons are milk contractors who buy and sell milk, buying it of the producers on the line of the defendants' road and distributing it at different points along the same. In consideration of the defendants agreeing to furnish Whiting & Sons with cars provided with icing facilities for the transportation of their milk, Whiting & Sons agreed to pay them a stipulated sum, to furnish the ice, to provide men to do the work incident to handling and caring for the milk while in transit, and to indemnify the defendants against the claims of any of the employés of Whiting & Sons "on account of personal injury or damage to property received while on the cars or premises" of the road. In view of the provisions of this contract, and, in consideration of his future em-

[2] The judgment was reversed for error in assessing the statutory penalty, and judgment entered for plaintiff for $75.

"The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation." Fagg, J., in Ballentine v. N. M. R. Co., 40 Mo. 491, 93 Am. Dec. 315 (1867).

"The plaintiff sues for injury to his goods and for damages sustained by unreasonable delay in their delivery. * * * It is to be noted that the basis of this action is the alleged breach of the duty imposed by the common law upon carriers to safely carry and within a reasonable time deliver goods tendered them for that purpose. For failure to perform this duty the person injured has a cause of action, in which he may recover such damages as he sustained within the reasonable contemplation of the parties to the contract." Connor, J., in Meredith v. R. Co., 137 N. C. 478, 50 S. E. 1 (1905).

For the duty of a common carrier to inform the shipper if unable to give adequate service, see Nichols v. Oregon Short Line, 24 Utah, 83, 66 Pac. 768, 91 Am. St. Rep. 778 (1901), inability to comply with notice to furnish cars; Swan v. Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153 (1904), wires down; Railroad Co. v. Mfg. Co., 16 Wall. 318, 21 L. Ed. 297 (1872), goods to be delivered to next carrier, received with knowledge that such carrier could not take delivery promptly. For the carrier's duty where the consignee will not accept, see ante, p. 143.

[3] The statement of facts is abbreviated, and parts of the opinion omitted.

ployment and other considerations, the plaintiff, an employé of Whiting & Sons engaged to handle and care for the milk, agreed with Whiting & Sons not to make or prosecute any claim against the defendants on account of injuries received by him during his employment and to indemnify Whiting & Sons against all liability on account of any such claim. The plaintiff was injured through the defendants' negligence while on their train in the performance of his duties under the contract, and the question we are called upon to consider is whether these contracts are valid and constitute a defense to this action.

The defendants say that both contracts are valid, and that they should be permitted to avail themselves of the benefits of the plaintiff's contract with Whiting & Sons to avoid circuity of action. But whether they can avail themselves of the provisions of that contract to avoid circuity of action depends upon whether their contract with Whiting & Sons is one the law will recognize and enforce. The defendants do not dispute the proposition that common carriers cannot by contract relieve themselves from liability arising from their own negligence in the performance of duties imposed upon them by law. * * *

Their contention as to this matter is simply this: That the furnishing of cars without icing facilities would have been a full compliance with their public duty as common carriers, and that Whiting & Sons, as shippers of milk, could not have required them to furnish cars with icing facilities for its transportation. In answer to this it may be said that, as incident to their business of common carriers of milk, it was the defendants' public duty to provide reasonable facilities for its reception and delivery, including care during transportation. Flint v. Railroad, 73 N. H. 141, 144, 59 Atl. 938; Sager v. Railroad, 31 Me. 228, 1 Am. Rep. 659; Steinweg v. Railway, 43 N. Y. 123, 3 Am. Rep. 673; Welsh v. Railroad, 10 Ohio St. 65, 75 Am. Dec. 490; Beard & Sons v. Railroad, 79 Iowa, 518, 520, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Potts v. Railway, 17 Mo. App. 394; Merchants' Dispatch Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; 2 Hutch. Car. (3d Ed.) §§ 495–497; Ray, Fr. Car. § 4, and cases there cited. "A railway company is bound to provide cars reasonably fixed for the convenience of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport. He must protect his goods from destruction or injury by the elements, from the effects of delay, from any source of injury which, in the exercise of care and ordinary intelligence, may be known or anticipated." Ray, Fr. Car. supra. He must "provide all suitable means of transportation and exercise that degree of care which the nature of the property requires." Smith v. Railroad, 12 Allen (Mass.) 531, 534, 90 Am. Dec. 166.

In addition to the duty imposed upon the defendants by the common law, our statutes provide that "the proprietors of every railroad shall

furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings, and grounds in connection with such transportation." Pub. St. 1901, c. 160, § 1; McDuffee v. Railroad, 52 N. H. 430, 457, 13 Am. Rep. 72. Inasmuch, therefore, as the defendants were common carriers of milk, and as it was their public duty to furnish all persons desiring to ship that commodity with reasonable facilities and accommodations for its transportation, this contention of the defendants resolves itself into the inquiry whether their plea states facts from which it can be inferred that the furnishing of cars with icing facilities was, under the circumstances, more than they could reasonably be required to do in the fulfillment of their public duty, for the question what facilities and accommodations were a reasonable compliance with their public duty—or, to state the proposition in another way, whether the cars furnished were more than their public duty required them to do—is a question of fact. Boothby v. Railroad, 66 N. H. 342, 344, 34 Atl. 157.

The plea does not allege that it would have been reasonable, in view of the defendants' public duty, for them to have refused to furnish the Whitings with cars provided with icing facilities for the transportation of the large quantity of milk which they were daily desiring to ship, nor facts from which such an inference could reasonably be made. On the contrary, it is alleged in the plea that "at the time of the execution of all the agreements herein mentioned, large quantities of milk were produced by individual farmers living along the line of said defendants' railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors, and consumers—to have it transported in special cars furnished with icing facilities, than to have it carried in ordinary cars." The only reasonable deduction to be made from this allegation is that cars with icing facilities were reasonably necessary, and that those furnished did not afford greater facilities than the defendants' public duty required.

It is further contended that the defendants could not have been required to carry the shippers' servants in milk cars, and that, when they agreed to carry them in these cars, they undertook to do more than their public duty required, and on this account could lawfully demand of the shippers the contract of indemnity which they did. But this contention is not supported by the facts in the case. As already stated, it was the defendants' duty to provide suitable cars in which to transport the milk. It was also their duty to provide men to handle and care for it while being transported. Beard & Sons v. Railroad, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Boscowitz v. Express Co., 93 Ill. 529, 34 Am. Rep. 191; Chesapeake, etc., R. R. v. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; and cases above cited. * * *

In this case it does not appear that the shippers were afforded the opportunity of having the defendants perform their full duty and handle

and care for the milk. There is no allegation in the defendants' plea, or provision in the contract of shipment, to that effect, and, in view of the absence of such an allegation or provision, and of the defendants' contention that they were under no duty even to provide cars with icing facilities for shipping the milk, it is to be inferred the shippers were not afforded such an opportunity, and that the defendants refused to provide the cars for the milk unless the shippers would furnish the men to handle and care for it and would indemnify the defendants against all liability for damages to the men and their property. In such case it is clear that we must hold that the shippers' contract of indemnity is unreasonable and void, and that the plaintiff's contract with the shippers, which is based upon the indemnity contract, cannot be availed of by the defendants as a defense to this action.

The plaintiff was upon the cars at the time of the accident with the defendants' consent. His passage was not free. The consideration for it was the service he rendered in caring for the milk, or the charge against his employers in shipping it. And as the defendants cannot, on the facts disclosed in the plea, avail themselves of the plaintiff's agreement with the shippers, it was the defendants' duty to use due care for the plaintiff's safety, and, if they or their servants were negligent, and he was injured in consequence thereof, they are liable in damages. * * *

Demurrer sustained.[4]

[4] "As common carriers they are by law bound to receive, transport, and deliver freights, offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee. But the rule which requires common carriers by land to deliver to the consignee personally at his place of business, has been somewhat relaxed in favor of said roads on the ground that they have no means of delivering beyond their lines; but it was held in Vincent v. Chicago & Alton R. Co., 49 Ill. 33, that at common law, and independent of the statute relied on in the argument, that in cases where a shipment of grain was made to a party having a warehouse on the line of the carrying road, who had provided a connecting track and was ready to receive it, it would be the duty of the railroad company to make a personal delivery of the grain to the consignee at his warehouse; because, say the court, 'the common-law rule must be applied, as the necessity of its relaxation' did not exist. This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided. Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing, and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prosecution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots." Baxter, C. J., in Coe v. Louisville & N. R. Co. (C. C.) 3 Fed. 775 (1880).

## BEDFORD-BOWLING GREEN STONE CO. et al. v. OMAN.

(Court of Appeals of Kentucky, 1903. 115 Ky. 369, 73 S. W. 1038.)

BARKER, J.[5] This action involves the rights of appellees to the use of a railroad switch which runs from the Memphis junction of the Louisville & Nashville Railroad Company's line in Warren county, Ky., about 3½ miles, to the quarry of the appellant Bedford-Bowling Green Stone Company. * * *

John Oman, having opened a quarry on the Loving tract, set apart to him, very near the quarry operated by the Bedford-Bowling Green Stone Company, is naturally very anxious to use the switch in transporting his machinery to his quarry, and in transporting his stone to the main line of the Louisville & Nashville Railroad; it being impracticable to haul such heavy freight for so long a distance in any other way. We do not think, however, he has any interest in the switch in question. * * *

The railroad switch involved in this litigation was built by the White Stone Quarry Company, and in so doing they entered into a contract with the Louisville & Nashville Railroad Company. * * * Afterwards, on the 23d day of May, 1893, the property having passed into the ownership of the Bowling Green Stone Company, a new contract was made between it and the railroad company. * * *

This contract, and other evidence in the record bearing upon the question, show that the Louisville & Nashville Railroad Company, during the continuance of this last contract, has the control and management of the railroad switch. It owns, controls, and operates the engines and other rolling stock which pass over the line. It keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows, it exercises the same control and dominion over this line that it does over any other part of its system; and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, becomes a part of the general system of the Louisville & Nashville Railroad Company. This being so, it cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it.[6] * * *

While it is the duty of the railroad company thus to receive and transfer freight for appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive or ship it. He has no right to trespass upon the private property of appellants in order to reach the road. * * *

[5] Parts of the opinion are omitted.

[6] The learned judge here quoted from the opinion in L. & N. R. Co. v. Pittsburg, etc., Co., 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447 (1901).

For the reasons herein given, this case is affirmed as to the Louisville & Nashville Railroad Company, and reversed as to the Bedford-Bowling Green Stone Company, for proceedings consistent with this opinion.

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## JONES v. NEWPORT NEWS & M. V. CO.

(Circuit Court of Appeals, Sixth Circuit, 1895. 65 Fed. 736, 13 C. C. A. 95.)

Action by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error. * * *

TAFT, Circuit Judge.[7] Plaintiff bases his claim for damages—First, on the violation of an alleged common-law duty; and, second, on the breach of a contract.

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

In Northern Pac. Ry. Co. v. Washington, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092, it was held that a mandamus would not lie to compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In Com. v. Fitchburg R. Co., 12 Gray (Mass.) 180, it was attempted to compel a railroad company to run regular passenger trains over certain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that mandamus would not lie because the maintenance of such facilities was left to the discretion of the directors.

Referring to this and other cases, Mr. Justice Gray, delivering the opinion of the Supreme Court in No. Pac. Ry. Co. v. Washington, supra, said: "The difficulties in the way of issuing a mandamus to

[7] Parts of the statement of facts and of the opinion are omitted.

compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station, or to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of the population and business at, near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or in case of abuse of their discretion by the Legislature, or by administrative boards intrusted by the Legislature with that duty, than by ordinary judicial tribunals. * * * To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases." [8]

Among the cases which Mr. Justice Gray cites in support of the foregoing is that of People v. New York, L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. In that case it was sought to compel a railroad company by mandamus to enlarge a passenger and freight station which was admittedly inadequate, but the writ was denied. The ground for the conclusion of the court, as stated by Mr. Justice Gray, was that "the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station houses for passengers waiting transportation," and no such duty was imposed by statute. See, also, Florida, C. & P. R. Co. v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30.

It is true that the foregoing were cases of mandamus, and that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at

[8] See, also, Honolulu R. T. Co. v. Hawaii, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186 (1908). Contra: People v. Chicago & A. R. Co., 130 Ill. 175, 22 N. E. 857 (1888).

In Concord & Mont. R. R. v. B. & M. R. Co., 67 N. H. 465, 41 Atl. 263 (1893), the court held that it could determine the location of a union station, which was conceded to be required for the public good.

a particular place, a breach of which can give an action for damages. If the directors have a discretion to establish and discontinue public stations, a fortiori have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. Railroad Co. v. Suffern, 129 Ill. 274, 21 N. E. 824. But this is very far from holding that there is any common-law liability to maintain a side track forever after it has once been established. The other Illinois cases (Vincent v. Railroad Co., 49 Ill. 33; Chicago & N. W. Ry. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690) may be distinguished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of obiter dicta which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice Gray's opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business. * * *

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, be-

cause it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of. * * *

The judgment of the Circuit Court is affirmed, with costs.

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## WEST CHESTER & P. R. CO. v. MILES.

(Supreme Court of Pennsylvania, 1867. 55 Pa. 209, 93 Am. Dec. 744.)

Error to Court of Common Pleas of Philadelphia.

This was an action of trespass, brought by Mary E. Miles against the West Chester & Philadelphia Railroad Company for removing her from the car by a conductor on defendant's railroad.

Mary E. Miles, a colored woman, the plaintiff, got into the car of the defendants below, at Philadelphia, to go to Oxford, and took a seat at or near the middle of it. A rule of the road required the conductor to make colored persons sit at one end of the car. He got a seat for her at the place fixed by the rule, and asked her to take it. She declined positively and persistently to do it. The conductor told her of the rule, requested her to take the other seat, warned her that he must require her to leave the cars if she refused, and at last put her out. There was no allegation that any force was used greater than was necessary to accomplish the object of compelling her to leave the cars. * * *

AGNEW, J.[9] It is admitted no one can be excluded from carriage by a public carrier on account of color, religious belief, political relations, or prejudice. But the defendants in their point asked the court to say that if the jury find that the seat which the plaintiff was directed to take was in all respects a comfortable, safe, and convenient seat, not inferior in any of these respects to the one she was directed to leave, she could not recover. The case, therefore, involves no assertion of the inferiority of the negro to the white passenger; but, conceding his right to be carried on the same footing with the white man, it assumes it to be not unreasonable to assign places in the cars to passengers of each color. * * *

The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances

[9] Parts of the statement of facts and of the opinion are omitted.

by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier, as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property.

The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper, who, if he have room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public, but no whit beyond.

The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He cannot interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as the servant of the company it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation, than it is to quell them. * * *

By uninterrupted usage the blacks live apart, visit and entertain among themselves, occupy separate places of public worship and amusement, and fill no civil or political stations, not even sitting to decide their own causes. In fact there is not an institution of the state in which they have mingled indiscriminately with the whites. Even the common school law provides for separate schools when their numbers are adequate. * * * Following these guides, we are compelled to declare that, at the time of the alleged injury, there was that natural, legal, and customary difference between the white and black races in this state which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of

carriers and passengers. The defendants were therefore entitled to an affirmative answer to the point recited at the beginning of this opinion. * * *

Judgment reversed, and a venire facias de novo awarded.[10]

READ, J., dissents.

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## JACKSON ELECTRIC RY., LIGHT & POWER CO. v. LOWRY.

(Supreme Court of Mississippi, 1901. 79 Miss. 431, 30 South. 634.)

CALHOON, J.[11] A street railroad company is under a duty to the public to stop at regular street crossings, on a seasonable signal, to receive those desiring to take passage. It cannot avoid this duty by any practice or rules of its own. Booth, St. Ry. Law, § 347. Its rules must be reasonable, and an absolute contrary rule would be unreasonable. It is unreasonable for it to have a rule that where its cars stopped beyond the crossing, they should not be backed to the proper place, in order to receive the person signaling, under all circumstances. Where the distance is short, and the road good, and no inconvenience is given the proposed passenger, it is not meant to hold that such a rule might not be held proper. But it is highly improper for it to be made, or obeyed, to apply in a case like that before us. Here it was a rainy night, and the road very muddy, and the stop 20 or 40 feet beyond the brick crossing, and the passenger, as known to the operatives, would have to walk seven blocks unless he got passage.[12] * * *

[10] Compare McLain v. St. Louis, etc., Co., 131 Mo. App. 733, 111 S. W. 835 (1908), in absence of regulation, a passenger need not change his seat to suit the convenience of the conductor; Rowe v. Brooklyn Heights R. Co., 80 App. Div. 477, 81 N. Y. Supp. 106 (1903), employé in uniform, off duty and paying fare, is entitled to ride in front seat when, and only when, no regulation forbids.

[11] The statement of facts and part of the opinion have been omitted.

[12] "A rule that baggage shall not be checked until a ticket has been procured is a reasonable regulation to prevent imposition upon the company. But a rule that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured, if there be such a rule, is an imposition upon the public, unreasonable and void. It would require intending passengers to care for their own baggage in many situations that may readily be imagined, where to do so would be entirely impracticable." Whitfield, J., in Coffee v. L. & N. R. Co., 76 Miss. 569, 25 South. 157, 45 L. R. A. 112, 71 Am. St. Rep. 535 (1899).

Compare the following cases, where regulations were held valid; Central of Ga. Ry. v. Motes, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223 (1903), no sleeping in waiting room; Phillips v. So. Ry. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163 (1899), waiting room closed from departure of 8 p. m. train until 30 minutes before leaving of next train at 1:20 a. m., though "the rule would probably be different in the case of through passengers and in the case of delayed trains"; Funderburg v. Augusta, etc., Ry. Co., 81 S. C. 141, 61 S. E. 1075, 21 L. R. A. (N. S.) 868 (1908), street car conductor not bound to change $5. See, also, Barker v. Cent. Park R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626 (1896). But see Barrett v. Market St. Ry. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15

## BIRMINGHAM RY., LIGHT & POWER CO. v. McDONOUGH.

(Supreme Court of Alabama, 1907. 153 Ala. 122, 44 South. 960, 13 L. R. A. [N. S.] 445, 127 Am. St. Rep. 18.)

Action for ejecting plaintiff from a street car. Defendant pleaded that it was operating a motor car with a "trailer" attached; that plaintiff, having taken passage on the motor car and paid fare to its conductor, went into the trailer, and refused to return to the motor car or to pay fare to the conductor of the trailer, though notified of defendant's reasonable rule that a passenger who changed cars must pay fare on the second car. Wherefore he was ejected without unnecessary violence. Plaintiff's demurrer to the plea was sustained.

DENSON, J.[18] * * * It is settled law in this jurisdiction, as it is elsewhere, that a common carrier of passengers is clothed with a common-law right to make reasonable rules and regulations for the conduct of his or its business; further, that the reasonableness or not of a given rule is a question of law for the court, and not one of fact to be determined by the jury. 6 Cyc. 545 (C), and authorities in note 62 to the text; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, and authorities there cited.

The question, then, is the reasonableness vel non of the rule set up in the plea. It may be said to be common knowledge that street cars in the city of Birmingham are usually crowded—at least, that they are frequently so. Therefore the conductor is not presumed to know all of his passengers. He must necessarily be a stranger to a large portion of them, and not acquainted with their character for truthfulness. If passengers are allowed, and have the privilege of boarding one car and moving from that to another car—the two being coupled together, as the plea in this instance shows the cars were joined—it would be a very easy matter for a passenger to board one car and move to the other, and claim, when called upon for his fare, that he had paid on the other car, when in truth he had not; and the different conductor could have no means of knowing that the moving passenger had paid fare. * * *

Again, as is suggested in brief of appellant's counsel, it is common knowledge that conductors are required to "register up" each fare collected in their proper cars, and are required to collect from and register each passenger on each car. This check on the conductors would be rendered valueless if passengers were allowed to change from one car to another—each car having a separate conductor—without paying fare. We are of the opinion, and so hold, that the rule

Am. St. Rep. 61 (1889); Montgomery v. Buffalo Ry. Co., 165 N. Y. 139, 58 N. E. 770 (1900), no standing on platform of street car, though passenger has sick headache and is likely to vomit.

[18] The statement of facts is based on facts stated in the opinion. Parts of the opinion are omitted.

pleaded is a reasonable one, in the proper conduct of the business of the defendant, and necessary to protect it against imposition. * * *

The insistence that the plea is bad, for that it fails to aver knowledge of the rule on the part of the plaintiff before he boarded the car from which he was ejected, is not sound. The plea avers that plaintiff was advised of the rule before he was ejected and that he might return to the motor car. In view of this averment, it was not necessary that he should have had knowledge of the rule before he boarded the car. * * *

Reversed and remanded.[14]

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## FORSEE v. ALABAMA GREAT SOUTHERN R. CO.

**(Supreme Court of Mississippi, 1885. 63 Miss. 66, 56 Am. Rep. 801.)**

Plaintiff boarded defendant's train at a way station and tendered the conductor 35 cents, which was the regular fare to his destination, saying that he had been unable to get a ticket at the station, because the ticket agent was not on hand. The conductor would not take the money, explaining that his instructions required him to collect 50 cents from passengers without tickets. On plaintiff's refusal to pay more, the conductor stopped the train, seized the plaintiff, and was about to eject him, when he paid 50 cents under protest. This action is brought to recover for the neglect and wrongful conduct of the

[14] Compare Lasker v. Third Ave. R. Co., ante, p. 49.

In Ketchum v. N. Y. City Ry. Co., 118 App. Div. 248, 103 N. Y. Supp. 486 (1907), a statute required the company to give a transfer on demand to each passenger paying a fare. A regulation conspicuously posted and advertised, refusing transfers unless asked for when fare was paid, was held valid, though unknown to the passenger; but where not posted or advertised, such a regulation was held invalid. McGowan v. N. Y. City Ry. Co. (Sup.) 99 N. Y. Supp. 835 (1906). A regulation, unknown to the holder, that a ticket shall be good only for travel by direct route, has been held not to deprive him of a right to travel on it by a usual, though longer, route. Ill. Cent. R. Co. v. Harper, 83 Miss. 560, 35 South. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469 (1904). So of a regulation restricting the use of a ticket to the day of sale, posted in stations, but unknown to the purchaser. Ga. R. Co. v. Baldoni, 115 Ga. 1013, 42 S. E. 364 (1902). Or printed as a condition on the ticket, even though discovered before use. Dagnall v. So. Ry. Co., 69 S. C. 110, 48 S. E. 97 (1903).

A railroad company may by regulation require a passenger who has a ticket to show it before entering the train, Ill. Cent. R. Co. v. Louthan, 80 Ill. App. 579 (1898); to show it at reasonable intervals to the conductor, Hibbard v. N. Y. & E. R. Co., 15 N. Y. 455 (1857); and to surrender it before reaching his station, Vedder v. Fellows, 20 N. Y. 126 (1859). It may refuse to accept a transfer check, unless the passenger enters at the transfer station. Nashville St. Ry. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451 (1900). It may refuse to permit a passenger not known to have paid fare to pass the conductor when collecting tickets. Faber v. Chicago Gt. W. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789 (1895). In Sickles v. Brooklyn Heights R. Co., 113 App. Div. 680, 99 N. Y. Supp. 953 (1906), a rule which required a passenger passing through the turnstile a second time to pay a second fare was held valid as applied to a passenger recognized as one who, with knowledge of the rule, had given notice that he was going back to search for a lost paper.

railroad company's agents. The trial court excluded evidence tending to show that, through the ticket agent's neglect of duty, plaintiff had been unable to get a ticket. Plaintiff had a verdict and judgment for $50, without costs. Plaintiff appealed.

ARNOLD, J.[15] * * * It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may, in the exercise of this right, make discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes, and inconvenience incident to collecting fare and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. State v. Goold, 53 Me. 279; Jeffersonville Railroad Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Swan v. Manchester, etc., Railroad Co., 132 Mass. 116, 42 Am. Rep. 432.

But such a regulation is invalid, and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 Redfield on Railways, 104; Evans v. M. & C. Railroad Co., 56 Ala. 246, 28 Am. Rep. 771; St. Louis, etc., Railroad Co. v. Dalby, 19 Ill. 353; St. Louis, etc., Railroad Co. v. South, 43 Ill. 176, 92 Am. Dec. 103; Smith v.

[15] The statement of facts has been rewritten, and parts of the opinion omitted.

Pittsburg, etc., Railroad Co., 23 Ohio St. 10; Porter v. N. Y. Central Railroad Co., 34 Barb. (N. Y.) 353; Jeffersonville Railroad Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Jefferson Railroad Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; State v. Goold, 53 Me. 279; Swan v. Manchester, etc., Railroad Co., 132 Mass. 116, 42 Am. Rep. 432; Du Laurans v. St. Paul, etc., Railroad Co., 15 Minn. 49 (Gil. 29) 2 Am. Rep. 102. * * *

The cause was tried in the court below on theories and principles of law different from those here expressed, and the judgment is reversed and a new trial awarded.

Reversed.[16]

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## MONNIER v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1903. 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619.)

O'BRIEN, J.[17] The plaintiff has recovered damages for an assault and battery committed upon his person by one of the defendant's conductors on the 16th day of November, 1900, when the plaintiff was in one of the defendant's cars as a passenger from Oriskany to Utica. There is little, if any, dispute about the facts. * * *

The rule of the company that required the conductor to collect 19 cents from the passenger who did not purchase a ticket is concededly a valid and reasonable regulation. It is sanctioned by the terms of an express statute, and the duty of the conductor was to enforce it, and therefore it was the duty of the passenger to submit to it. A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. Without such rules the corporation will not be able to perform the functions for which it was created.

In the present case no one questions these propositions, but what is asserted in behalf of the plaintiff is that, behind these reasonable regulations there was a fact which rendered them inoperative or inapplicable to him, and that was the fact that the ticket agent was not in his office when the train started, and in consequence of his absence the plaintiff was unable to procure a ticket. But the conductor could not

[16] Acc. Ammons v. Railway, 138 N. C. 555, 51 S. E. 127 (1905).

A condition in a valid ticket that the passenger, if its validity is disputed, shall pay fare and apply at the company's office for a refund, has been held unavailing to deprive him of his right to be carried on the ticket, though its validity is disputed in good faith. O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639 (1899); Cherry v. Railroad, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830 (1905); Ga. Ry. Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. Rep. 246 (1906). So of a rule requiring holder of ticket to present it on request at the ticket receiver's office for investigation before entering train. No. Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422 (1892).

[17] Parts of the opinion are omitted.

know what the fact was in that respect, and was not bound to take the passenger's word for it; nor could he try and decide the question upon the word of the other passengers who procured tickets at the same station. The simple duty of the conductor is to execute and enforce all reasonable rules, and that of the passenger is to obey them. If there is some fact or omission behind the rules, not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor; and if, under such circumstances he invites a personal collision with the officer in charge of the train, resulting in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery.

In this case the plaintiff acted upon the principle that if he could ultimately prove that the ticket office was not open when the train started, and that he could not procure a ticket, he had the right to refuse to pay the 19 cents, and to resist the conductor by force when he attempted to put him off. It would be difficult to show that such a principle has any support in reason, justice, or authority. * * *

It would be an absurd and intolerable rule of law that would permit passengers upon a railroad to resist the officer in charge whenever a dispute arose in regard to some trivial matter wherein the passenger had a real or fancied grievance. When the plaintiff was told that he must, under the rules, pay the 19 cents or leave the car, it was his duty either to pay the extra 4 cents, or leave, and resort to the remedy which the law gave for the redress of his grievance. The conductor could not suspend the rule merely because he was told that the passenger could not procure a ticket before the train started, and, when notified by the conductor that removal from the train must follow his refusal to pay, he had notice of the rule and the consequence of his disobedience to it. When he waited for the application of force to remove him, he did so in his own wrong. He virtually invited all the force necessary to remove him, and, since no more was applied than was necessary to effect the object, he cannot recover, either against the conductor or the defendant in an action for assault and battery. Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419.

No case has been cited that sustains the proposition contended for by the learned counsel for the plaintiff, and that is that the plaintiff had the right to resist the conductor by force, on the ground that he was unable to procure a ticket. * * * The cases in other jurisdictions are to the effect that in a case like this the passenger must submit to the inconvenience of either paying the fare demanded or ejection, and rely upon his remedy against the company for the negligence or mistake of the ticket agent. The conductor cannot decide, from the statement of the passenger or his neighbors, what the facts are which may affect the operation of the rules. This would require more time than the conductor can find in the proper discharge of his duties, and would expose the company to numerous and constant

frauds. Bradshaw v. Railroad, 135 Mass. 407, 46 Am. Rep. 481; Frederick v. Railroad [ante, p. 215]; Shelton v. Railroad, 29 Ohio St. 214; Dietrich v. Railroad Co., 71 Pa. 432, 10 Am. Rep. 711; Railroad Co. v. Griffin, 68 Ill. 499; Pouilin v. Can. Pac. Ry. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800; Hall v. M. & C. R. R. Co. (C. C.) 15 Fed. 57; Wiggins v. King, 91 Hun, 343, 36 N. Y. Supp. 768. * * *

The law imposes upon the individual the duty of obedience, under all circumstances, to lawful authority, and if, underlying the authority, there may be a question of fact which renders the exercise of it unlawful, it is not for the party himself to decide that question, and resort to violence or forcible resistance. The remedy is to appeal to the regular tribunals for the redress of any wrong or injury that he may have sustained in consequence of his enforced obedience to the regulation which he claims was not, for some reason, applicable to him under the circumstances.

We have, of course, no reference here to cases where personal rights or privileges may be invaded without jurisdiction or warrant of law, but to cases that in some sense are analogous to that of an officer who is called upon to execute process regular upon its face, though behind the process there may be some fact which would justify the decision that it was absolutely void. In such cases the individual affected must, for the time being, yield to the process and resort to proper proceedings to set it aside or to redress the injury.

For these reasons I think the judgment should be reversed, and a new trial granted; costs to abide the event.

BARTLETT, J. (dissenting). * * * If plaintiff failed to purchase a ticket before entering the train, opportunity having been afforded him to do so, he was liable to pay the statutory penalty of extra fare, and, refusing to do so, his ejection from the train was proper. On the other hand, if the defendant, by its act, rendered it impossible for the plaintiff to procure a ticket, his ejection from the train was wrongful, and this action lies. The argument on behalf of the defendant and appellant is, in brief, that the plaintiff should have paid the extra fare penalty, or left the train when requested to do so by the conductor, relying in either event upon his legal remedy; that the violence and indignity visited upon the plaintiff were of his own seeking, and he cannot recover damages therefor. This is not the law. The plaintiff and defendant were each bound in the emergency to determine the character of his or its legal rights, as it frequently happens that parties drifting into a legal controversy are driven to decide this question at their peril. * * *

PARKER, C. J., and HAIGHT and CULLEN, JJ. (in a separate opinion), concur with O'BRIEN, J. MARTIN and VANN, JJ., concur with BARTLETT, J.

Judgment reversed.[18]

[18] See ante, pp. 227-228.

# CHAPTER III

# CHARGES FOR SERVICE

WHITE, J., in TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL CO., 204 U. S. 426, 436, 27 Sup. Ct. 350, 51 L. Ed. 553 (1907): "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge." [1]

[1] This was an action begun in a state court to recover for an excessive freight charge exacted on an interstate shipment. The court gave judgment for the plaintiff on a finding that the charge was unreasonable, although it was the rate specified in the schedule filed and posted by the carrier as required by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). Section 1 of the act forbids an unreasonable charge. Section 6 forbids a different charge from that contained in the schedule. Other sections forbid discrimination and undue preference, and provide that persons damaged by a violation of the statute may proceed at their election before the Interstate Commerce Commission in a specified mode, or before a District or Circuit Court of the United States, and that nothing therein contained shall abridge existing remedies at common law. The United States Supreme Court reversed the judgment. White, J., said: "* * * If it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. * * * Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute intended to remedy could be successfully inflicted. * * * If the power existed in both courts and the Commission to originally hear complaints on this subject, there might be divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

## CANADA SOUTHERN RY. CO. v. INTERNATIONAL BRIDGE CO.

(Privy Council, 1888. L. R. 8 App. Cas. 723.)

Appeal from a decree declaring the bridge company entitled to collect tolls from the railway company for the use of its bridge across the Niagara river at the rates, fixed by its directors, of 10 cents for each passenger, and $1.00 for each loaded freight car, with certain other sums for other cars.[a]

The LORD CHANCELLOR (Earl of SELBORNE), after deciding that no statute imposed on the right to fix tolls "any limit other than such, if any, as might be implied by law, namely, that the charges should not be unreasonable," continued:

* * * It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made.

One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the

[a] The statement of facts has been rewritten.

railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Appeal of the Province of Ontario should be affirmed, and both these appeals dismissed, with costs.[3]

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## TIFT v. SOUTHERN RY. CO.

(Circuit Court, W. D. Georgia, 1905. 138 Fed. 753.)

Bill in equity by persons composing the Georgia Sawmill Association for an injunction restraining the defendant railroad companies from inaugurating or maintaining a published advance of two cents a hundred pounds in freight rates on lumber from points in Georgia to points on the Ohio river and beyond. The injunction was asked for on the ground that the advance would violate the act to regulate commerce and cause irreparable injury to complainants.[4] A temporary injunction

[3] See, also, Brewer, J., in Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92 (1901). Compare Beale & Wyman, Railroad Rate Reg. §§ 520, 521.

[4] The "Act to regulate commerce," commonly called the "interstate commerce act" (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. 1901, p. 3154]), recites in substance that its provisions shall apply to common carriers carrying by railroad goods or passengers within the United States in interstate, foreign, or territorial commerce, and to certain other similar carriage. It includes the following provisions:

"Section 1. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. * * *

"Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense. * * *

"Sec. 11. That a commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. * * *

"Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts. Whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common

was issued, but afterwards dissolved; the court considering that it should withhold action until the question of the reasonableness of the rates had been passed upon by the Interstate Commerce Commission. The advance went into effect.

Complainants took proceedings before the Commission, which reported that the advance was unreasonable, unjust, and in violation of the act to regulate commerce, and made the following order: "That the defendants, the Southern Railway Company, Atlantic Coast Line Railway Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railroad Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company, be, and each of them is hereby, notified and required to cease and desist, on or before the 1st day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per one hundred pounds, and the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid."

Complainants filed with the court a copy of the opinion and order of the Commission and renewed their application for an injunction.

SPEER, District Judge.[5] * * * The shippers are appealing to government to protect them against unwarrantable exactions by the carriers. Appeal may be made by the carriers to protect their interests from unremunerative rates to which they may be restricted by state or other local authorities. In either case complaint is heard and redress is given. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362,

carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. Said commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Sections 14, 15, and 16, as originally enacted, provided that the Commission should, after investigation, make a report, including findings of fact; that the findings should in all judicial proceedings be prima facie evidence of the facts found; that, if satisfied that the act had been violated, the Commission should order the carrier to desist from or make reparation for such violation, or both; that, if the carrier disobeyed, the Commission or any person interested might apply by summary proceedings to a designated Circuit Court of the United States; and that the court should have power to review the action of the commission and enforce its order by judgment or decree, if found to be correct. Interstate Com. Com. v. Ala. Mid. Ry., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414 (1897).

For the provisions of these sections as amended by the Hepburn act of 1906, see 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149). For later amendments, see Act April 13, 1908, 35 Stat. 60 (U. S. Comp. St. Supp. 1909, p. 1151), and especially Act June 18, 1910.

[5] The statement of facts has been rewritten, and parts of the opinion omitted.

14 Sup. Ct. 1047, 38 L. Ed. 1014; Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Rose's Notes on U. S. Reports, vol. 11, p. 946 et seq. It is no longer doubtful that "the question of the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation." Justice Blatchford, in Chicago & St. Paul Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. To this end, in part, the government has created the Interstate Commerce Commission. It is a tribunal to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequalities and injustice therein.

Said the Supreme Court in Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309: "That body, in the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon the questions of fact of the character here arising." In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce. * * *

It is proper to observe, however, that the court has considered the entire record, and has formed its conclusions not only from the report of the Commission, but from all the evidence submitted to that body and stipulated into the case here, and from the additional evidence submitted de novo on this hearing.

A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association. * * * In reply to the contention on the part of the respondents that they acted independently each for itself, and not through the agency of the Southeastern Freight Association, the Commission finds: "The proof shows conclusively that the advance was the outcome of concert of action and previous understanding between the companies. Through their authorized official representatives, they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and, finally, they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber-hauling roads serving the territories both west and east of the Mississippi in Arkansas, Louisiana, Mississippi, Alabama, and Florida."

The Commission concludes that it is its duty to consider this joint, or concert of, action of the defendants as bearing upon the reaonableness and validity of the advanced rate which results. It holds that

the element of competition is eliminated. In the absence of legitimate competition, destroyed, as we shall presently see, by methods obviously illegal, the Commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the state courts.

Perhaps the leading cases on this subject are United States v. Freight Association, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; Joint Traffic Association Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In the first case the court had under consideration the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law[6] prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries applies to and covers common carriers by railroad, and a contract between them in restraint of such trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby effecting

[6] Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200): "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges, three of whom are not now on the bench of the court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri Case. * * *

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested in corporations. It is, however, business of a quasi public nature. As we have seen, there is no doubt that within the limitations of the Constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. * * *

After careful consideration of the extensive record, there seems to have been an utter absence of excuse or justification for the concerted action of the railroads which advanced the rates on lumber throughout the South. The vast increase of the lumber traffic had resulted in large increase of net revenue for those roads. The service was inexpensive. It required neither rapidity of movement nor specially equipped cars, and such simple equipment as was needed the shippers were obliged to furnish and pay for. The railroads were required neither to load nor unload the cars. This was done by the consignor and consignee. The lumber carried was neither fragile nor perishable, and the risk therefore from loss or damage was inappreciable. Mr. Tift, the principal witness for the complainants, and one of the largest

lumber men of the state, testified that for 30 years he had not been compelled to present a claim for damage on lumber shipped from his mill. Nor were there any exigencies in the financial condition of the principal defendants which called for so vast a contribution to their treasuries from an industry whose product forms such a large part of their tonnage, and which is so indispensable to the public welfare. * * *

They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of laws, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the people. * * *

In this case the conclusions of the court as to the issues involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered.[7] * * *

[7] Affirmed 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124 (1907).

"The words 'reasonable' and 'just,' as used in the statute, as applied to rates, are each relative terms. They do not mean to imply that the rates upon every railroad engaged in interstate commerce shall be the same, or even about the same. The conditions and circumstances of each road surrounding the traffic, and which enter into and control the nature and character of the service performed by the carrier in the transportation of property, such as the cost of transportation, which involves volume or lightness of traffic, expenses of construction and of operation, competition in some respects of carriers not subject to the Law, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight, and risk of carriage to carrier, all have to be considered in determining whether a given rate is 'reasonable' and 'just.'" New Orleans Cotton Ex. v. I. C. R. R., 2 Interst. Com. R. 785 (1890).

"We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from Chicago to New York at a cost less than that by most other routes. It would hardly be just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone and which had no reference to its competitors. Upon the other hand, it would be equally unfair to the public if the most expensive lines were made the standard." Prouty, Commissioner, In the Matter of Proposed Advances in Freight Rates, 9 Interst. Com. R. 382 (1903).

"We understand the purport of this request to be that a public service company cannot lawfully charge in any event more than the services are reasonably worth to the public as individuals, even if charges so limited would fail to produce a fair return to the company upon the value of its property or investment. Such we think is the law. * * * The company engages in a voluntary enterprise. It is not compelled at the outset to enter into the

## SOUTHERN PAC. CO. v. BARTINE.

(Circuit Court, D. Nevada, 1909. 170 Fed. 725.)

FARRINGTON, District Judge.[8] These suits were brought to prevent enforcement of the so-called "Railroad Commission Law" [of the state of Nevada] on the ground that it is repugnant to the federal and to the state Constitutions. Substantially the same issues are raised in each case, therefore all will be considered together. * * *

In brief, the act provides for the creation of a railroad commission, charges it with the administration and enforcement of the law, defines its powers and duties, fixes the compensation of its members, fixes maximum freight rates, empowers the Commission to establish rates after investigation, prohibits unjust discrimination, provides methods of procedure to enforce the law, and fixes penalties for its violation. * * *

The business of the company is either interstate or intrastate traffic. All business which originates out of, comes into, and is laid down in the state, all business which originates in and passes out of the state, and all business which originates out of, passes through, and is deliver-

undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers." Savage, J., in Water District v. Water Co., 99 Me. 371, 59 Atl. 537 (1904).

"There are eight roads or lines carrying between Chicago and Kansas City. A less number might do the business as well and cheaper. If eight more were built, the rates might need to be doubled, if all roads constructed have a right to such income as will meet the obligations of the companies owning them." In the matter of Rates on Food Products, 3 Interst. C. R. 93 (1890).

"The preamble and resolution of the Senate and the resolution which led to their adoption imply that, to be reasonable, the rates on food products must be such as to enable the products to be marketed at actual cost of production. This basis or limit of compensation for transportation services will hardly stand the test of fair dealing. * * * We think it is true that at the prices which have at times prevailed since the gathering of the last crop corn from the most distant fields [it] could not be marketed at actual cost of production and pay reasonable rates. But the evil cannot be remedied without taking the services or property of men engaged in one business or employment and transferring them to those engaged in other employments." Id.

"We think no better rule applicable to the matter under investigation than that applied by railroads themselves, in acordance with which rates are so adjusted as to secure the largest interchange of commodities. This rule is approved by its frequent application in the movement of Western grain through the voluntary action of the roads. Put such a rate on corn as will encourage and warrant its movement, if such a rate is fairly remunerative. While rates should not be so low as to impose a burden on other traffic, they should have reasonable relation to cost of production and the value of the transportation service to the producer and shipper. In the carriage of the great staples, which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding moderate profit are both justifiable and necessary." Id.

See further, In the Matter of Proposed Advances in Freight Rates, 9 Interst. Com. R. 382 (1903); Interstate Commerce Com. v. So. Ry. (C. C.) 117 Fed. 741 (1902); Chicago, etc., Ry. v. People, 136 Ill. App. 2 (1907); So. Ry. v. Railroad Commission of Indiana, 42 Ind. App. 90, 83 N. E. 721 (1908); In re Arkansas Railroad Rates (C. C.) 163 Fed. 141 (1908).

[8] The statement of facts and parts of the opinion are omitted.

ed outside the state, is classed as interstate. All business which is picked up, carried, and delivered wholly within the state of Nevada is intrastate or domestic business.

It is only the intrastate business which can be considered in these proceedings. With the regulation of rates, tolls, and charges on interstate traffic, the Legislature has nothing to do. It is well settled that a state, either through its Legislature or by a railroad commission, may make and regulate rates, charges, and tolls for intrastate traffic, and that this subject is primarily within the control of the state. This power finds its root in the old common law. When a man parts with his property it is no longer his; when he devotes it to the public use it ceases to be private property. "He, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use. When private property is devoted to public use, it is subject to public regulation; if the right to regulate exists, the right to establish the reasonable compensation for services as one of the means of regulation is implied." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

If the state prescribes a schedule of maximum rates for transportation of intrastate freight, the rates must be reasonable; that is, they must be reasonable both to the carrier and to the public. It must always be remembered that the carrier is entitled to a just and reasonable compensation for his services and for the use of his property devoted to public service. This compensation up to the full measure of what is just and reasonable is his property, and is protected by that provision of the federal Constitution in which it is ordained that no state shall "deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws." "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418, 456, 458, 10 Sup. Ct. 462, 467, 33 L. Ed. 970.

Bearing these principles in mind, it is first in order to ascertain the reasonable value of that portion of the Southern Pacific Company's property which is devoted to the movement of intrastate freight; that is, to transportation which both begins and ends in the state. The rule for ascertaining such value is thus stated in Smyth v. Ames, 169 U. S. 466, 544, 546, 18 Sup. Ct. 418, 433, 434, 42 L. Ed. 819: "It cannot, therefore, be admitted that a railroad corporation maintaining a high-

way under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. * * * The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The evidence discloses but little testimony as to the present reasonable value of the property in question. The Southern Pacific Company operates under a lease the Central Pacific Railway Company's property in Nevada, and it is the value of this property which we are to ascertain. * * *

A reasonable return on this valuation should be required from the whole Nevada business done on the Central Pacific Railway, and only a fair proportion thereof from the intrastate freight traffic.

[The court then entered upon an analysis of the evidence as to the cost and earnings of the Nevada intrastate traffic of the Central Pacific Company. It declined to hold the statute rates unconstitutional.]

* * *

Nevada & California Railway Company.

The undisputed testimony shows that the total issued capital stock of the company amounts to $4,837,000. The proportionate amount

thereof allotted to Nevada on a mileage basis is $3,265,543. This last amount will be distributed to the intrastate traffic of the company in the ratio which its total Nevada earnings, $1,820,766.79, bear to $250,079.71, its total earnings from Nevada intrastate freight, or 13.7348+ per cent. 13.7348+ per cent. of $3,265,543 is $448,515.80, the capital stock of the company allotted to intrastate freight.

The total funded debt of the company is $2,000,000, on which the annual interest charge is $80,000; the proportionate amount of debt allotted to intrastate freight is $184,887.09, on which the annual interest is $7,395.42.

The total cost of the entire line of the Nevada & California Railway to June 30, 1907, was $6,544,911.32, of which the proportionate amount allotted to Nevada on a mileage basis is $4,405,061.20, and to Nevada intrastate freight traffic $605,026.34. The taxes paid by the company on its Nevada property in 1907 amounted to $47,649.56. Of this amount the intrastate traffic will be charged with 13.7348+ per cent., or $6,542.28.

In this case it is shown that the intrastate freight business of the Nevada & California Railway Company is more expensive than the business of the company as a whole, in the proportion of 3 to 1; the ratio, however, applies only to so much of the expense of operation as relates to the cost of conducting transportation. * * *

During the year 1907 the company transported, all told, on its entire line 53,637,779 tons of freight one mile at a cost for conducting transportation of $298,808.22. * * *

The company in 1907 moved 7,151,303 tons of intrastate freight one mile. Multiplying the number of tons by the cost of moving one ton one mile, the result is $113,539.80, or the cost for conducting transportation of intrastate freight.

Operating expenses for maintenance of way and structures, maintenance of equipment and general expense, are not shown to be greater for intrastate freight than for freight in general. In 1907 the total number of tons moved one mile in Nevada was 51,590,165, of which 7,151,303 were intrastate freight. The total earnings were $1,317,302.37, of which $250,079.71 were the earnings from intrastate freight. If the maximum rates of the statute had been in force during that year, the intrastate freight earnings would have been reduced by the sum of $98,586.04.

The total expense of moving all Nevada freight is apportioned as follows:

| | | |
|---|---|---|
| Conducting transportation | | $244,566 13 |
| Maintenance of way | $125,316 55 | |
| Maintenance of equipment | 86,480 07 | |
| General expense | 18,183 02 | $229,979 64 |
| Total operating expense for all Nevada freight, 51,590,165 tons | | $474,545 77 |

Dividing the total expense for maintenance of way, etc., $229,979.64, by 51,590,165, the number of tons moved one mile, the result is

.4457+ of one cent per ton mile. Multiplying 7,151,303, the number of tons of intrastate freight moved, by .4457+ of one cent, the cost per ton mile, we have $31,873.35, expense of intrastate freight for maintenance of way, etc.

These results may be summarized as follows:

| | | |
|---|---|---|
| Total receipts for hauling intrastate freight | | $250,079 71 |
| Reduction if maximum rates had been in force | | 98,586 04 |
| Total receipts under reduced rates | | $151,493 67 |
| Conducting transportation | $113,539 80 | |
| Maintenance of way, etc | 31,873 35 | |
| Taxes | 6,542 28 | $151,955 43 |
| Excess of expense and taxes over income | | $ 461 76 |

Operating expenses, including taxes, exceed the income which could have been received under the maximum rates by $461.76. Thus there is nothing left for interest or for dividends on the stock.

In Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, Judge Morrow held that water rates fixed by a municipal ordinance which yielded but 4.40 per cent. return on the reasonable value of the property employed in supplying San Francisco with water, were confiscatory. Judge Gilbert, in a subsequent case between the same parties ([C. C.] 165 Fed. 657, 666), held that rates fixed by a municipal ordinance which yielded less than 4.4 per cent. on the investment were confiscatory.

On the undisputed facts of this case, and evidence which was introduced without objection and without contradiction, the maximum rates, if enforced, would result in confiscating the use of complainant's property.[9]

San Pedro, Los Angeles & Salt Lake Railroad Company.

* * * The San Pedro Railroad runs across the southern portion of the state for a distance of 210.87 miles, through a sparsely settled, unproductive country. * * * The road was opened in May, 1905. During the 11 months ending May 31, 1907, the company handled but 898 tons of intrastate freight; this was carried an average of 62.73 miles, making 56,233 ton miles all told, for a compensation of $3,733.-49. * * *

It is true the net income above operating expenses was not sufficient during the 11 months mentioned to pay that portion of the taxes and of the interest on the funded and floating debt which was properly chargeable to Nevada intrastate freight traffic. But this is also true of the company's Nevada business in general, the deficit for that business being $405,475.97. And it also appears that the total income of the company from its business in Utah, Nevada, and California as a

[9] The bill was dismissed as prematurely filed. The court said: "When an unjust or unreasonable rate or schedule of rates has been actually and finally adopted by order of the board, it may be properly challenged, and its enforcement enjoined."

whole was insufficient to pay operating expenses, taxes, and interest on the debt, the deficit being $313,825.93. * * *

It does not necessarily follow that a schedule of maximum rates fixed by law is confiscatory because it fails to yield a reasonable return on the investment, above taxes, operating expense, and interest on the indebtedness. The rates must be reasonable to the company, but they must, in any event, be reasonable to the public. If a railroad is built into a new, sparsely settled territory with a view of serving a large future population and developing business, the Constitution does not require the few people and the small business of the present time to pay rates which will yield an income equal to the full return to be gathered when the country is populated and business developed to the full capacity of the road. Beale & Wyman, R. R. Rate Reg. §§ 343, 344, 462; Capital City Gaslight Co. v. Des Moines (C. C.) 72 Fed. 829, 844; Boise City I. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399; Water Dist. v. Water Co., 99 Me. 371, 376, 59 Atl. 537.

In San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 23 Sup. Ct. 571, 574, 47 L. Ed. 892, Mr. Justice Holmes says: "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

Under the evidence it cannot be held that the maximum rates if applied as a whole to the intrastate freight traffic of this company are confiscatory.[10]

[10] In Alabama, etc., Ry. v. Miss. R. R. Commission, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. Ed. 289 (1906), where the order of a railroad commission required a railroad to give the same low rate to all shippers of grain which it had been giving to some shippers, and the railroad contended that the rate was unremunerative, Brewer, J., said: "Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for services rendered, yet when it voluntarily establishes local rates for some shippers it cannot resist the power of the state to enforce the same rates for all."

A Legislature may fix a rate for transportation by common carriers, or may prescribe that the rate shall be reasonable, and confer, it seems, upon an administrative board power to ascertain what rates are of that character and to promulgate them.

"This law establishes, and thenceforth assumes the existence of, rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. * * * If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the commission. But the theory of this law is to delegate to the commission the power to ascertain facts and to make mere administrative regulations." Timlin, J., in Minn., etc., Ry. v. R. R. Comm., 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821 (1908).

"The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially at least, the mere administration of that law to the railroad commissioners. Suppose, in-

stead of a general declaration that rates should be reasonable and just, it had ordered that the rates should be so fixed as to secure to the carrier above the cost of carriage 8 per cent. upon the money invested in the means of transportation, and then committed to the board of railroad commissioners the fixing of a schedule to carry this rule into effect, would not the functions thus vested in such a board be strictly administrative?" Brewer, J., in Chicago, etc., R. Co. v. Dey (C. C.) 35 Fed. 866, 874, 1 L. R. A. 744 (1888).

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. * * * We may say of the legislation in this case * * * that it does not in any real sense invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." White, J., in Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525 (1904).

Since the rates are fixed as being those which the statute prescribes, a commission which fixes and puts them into effect in doing so decides what the rights and duties are which the statute has created or declared. The making of such a decision is judicial in character, and though, when made by a commission, it is an exercise of administrative power, in that it is a step in the discharge of an administrative function, it is not in nature such as to be exclusively administrative, or nonjudicial, within the constitutional principle which forbids the grant of nonjudicial power to a court. See Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084 (1889). It would seem, therefore, that a Legislature may constitutionally provide for a review by a court of a valid order of a commission fixing rates, and may give the court power to nullify the order if the action of the commission, though within its power, was erroneous, at least if the error is clear. Minn., etc., Ry. v. Railroad Comm., supra. And see Int. Com. Com'n v. Ala. Mid. Ry., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414 (1897); U. S. v. Duell, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559 (1899); Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813 (1888). But compare Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014 (1894); Steenerson v. Gt. No. Ry. Co., 69 Minn. 353, 72 N. W. 713 (1897).

If a rate fixed by law turns out to be less than the worth of the service rendered, and so low that the carrier cannot earn a fair income, the statute or order prescribing it is not "due process of law," no matter how thoroughly the subject has been investigated and how carefully the rate has been fixed, whether by legislature, commission, or court. Prentis v. Atl. Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. R. A. 150 (1908). When the ordinary jurisdiction of a court is invoked to enforce an alleged right, and the right, or a defense set up against it, depends on the validity of a statutory rate, the court may pass upon the validity of the rate, though the statute itself gives no jurisdiction to do so. Atlantic Coast Line v. Commonwealth, 102 Va. 599, 46 S. E. 911 (1904); Chicago, etc., Ry. Co. v. Minn., 134 U. S. 418, 456, 10 Sup. Ct. 462, 702, 33 L. Ed. 970 (1890).

## CHAPTER IV

## EQUALITY OF SERVICE

### SCOFIELD v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Ohio, 1885. 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.)

Case reserved for decision by the Supreme Court. The plaintiff filed a petition in the court of common pleas praying that the defendant might be restrained from discriminating against them and in favor of the Standard Oil Company as to rates charged for shipping oil, either upon its own lines or, in case of through shipments, over its line and connecting lines.

The court found that the railroad, in consideration of a promise by the Standard Oil Company to ship all their product of petroleum over its line, agreed to carry for the Standard Oil Company at an average rate about 10 cents less than the published rate charged their competitors, the plaintiffs. The difference of 10 cents a barrel on the yearly output of plaintiff's refineries would amount to about $15,000, or 21 per cent. of the capital used in their business.

ATHERTON, J.[1] The main question in this case, and to which all others are subordinate, is this: Has the defendant a right to discriminate between its freighters and customers, and furnish transportation to one at a less rate than to others, in a case where such discrimination is injurious to and destructive of the legitimate business of others? * * *

The learned Chief Justice Beasley, in pronouncing the judgment of the Supreme Court of New Jersey, said: "In my opinion, a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier, * * * but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such. They must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion

[1] The statement of facts has been rewritten and parts of the opinion omitted.

of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. * * * In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must, in the exercise of their calling, observe to all men a perfect impartiality." Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407, 13 Am. Rep. 457.

* * * It will be observed that the gist of plaintiffs' contention is not so much that the latter are charged a rate of compensation for transportation unreasonable in itself, as that by charging a lower rate to their more favored competitor the latter is enabled to and is supplying the market at a price with which the plaintiffs cannot compete, and thus driving them out of the market and destroying the business and trade they have built up. One of the questions at issue between the parties is: What was the doctrine of the common law upon the question of the compensation of a common carrier? Could the freighter require anything more than that he be charged no more than a reasonable compensation, or could he demand and have his goods transported at an equal rate with the favored customer?

In many cases it has been held that the customer was only entitled to have his goods shipped at a reasonable rate, and not necessarily at an equal rate with others, and that he was not interested in the matter that somebody else was charged less. Or in the incisive language of Crompton, J., to counsel in an English case: "The charging another person too little is not charging you too much."

The question, so far as it related to railroads, was settled by statute in England shortly after their introduction there; and under the "equality clause" of the English statutes railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances. Pickford v. Grand Junction R. Co., 10 Mees. & W. 399; Baxendale v. London & Southwestern Railway Company, L. R. 1 Ex. 137; L. & N. W. R. Co. v. Evershed, 26 W. R. 863. * * *

In discussing the English "equality statute" before adverted to, Beasley, C. J., pronouncing the opinion of the Supreme Court of New Jersey, says: "But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. * * * In a more recent decision Mr. Justice Strong says that the special provisions which are sometimes inserted in railroad charters in restraint of undue preferences are 'but declaratory of what the common law now is.' This is the view which, for reasons already given, I deem correct." Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407–412, 13 Am. Rep. 457.

In some of the cases it is announced that the question of whether the law requires the common carrier to transport goods upon equal terms to all, or whether it only requires that the rate shall be reasonable, but not necessarily equal to all, has been differently determined

by the courts of England and America. Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

But, be that as it may, the tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a quasi public duty to transport merchandise on equal terms, for all parties, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored. "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void as creating an illegal preference." Messenger v. Pennsylvania R. Co., supra. The Chief Justice (page 410 of 36 N. J. Law [13 Am. Rep. 457]) says: "It cannot be denied that at the common law every person under identical conditions had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus in the very foundation and substance of the business there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. * * * Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. * * * The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. * * * The rule that the carrier shall receive all the goods tendered loses half its value as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of the other." * * *

The case of Hays v. Pennsylvania Company (C. C.) 12 Fed. 309, decided by Baxter, J., in the Circuit Court of the United States for the Northern District of Ohio, is important in respect to one element in this case. The defendant in the case at bar claims that it was proper to enter into the contract it did with the Standard Oil Company, on account of the very large amount of freightage that company annu-

ally furnishes, and that it was lawful to discriminate in their favor on that account. The plaintiffs in that case had been engaged for several years in mining and shipping coal from Salineville, and the defendant's railroad furnished them with their only means of getting their coal to market. The railroad company discriminated in favor of every shipper who shipped 5,000 tons or over, and the discrimination was from 30 to 70 cents per ton, graduated by the amount shipped.

Plaintiffs were required to and did under the discrimination pay a higher rate than their more favored competitors. They brought suit to recover for the discrimination, and under the instructions of the trial judge the jury returned a verdict for plaintiffs. The judge on a motion for a new trial said: "The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. * * * The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man engaged in mining coal, and dependent upon the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and, perhaps, tempted to favor their friends to the detriment of their personal or political opponents, or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them, or else, seeing the augmented power of capital, organize into overshadowing combinations, and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed

for railroads in this case. But we think no such power exists in them. They have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

The District Court, in their finding 10½, state that shipment by the car load was the manner in which nearly all the business was done; that, on the request of either party to furnish cars, the defendant had them switched to the refineries, and after being loaded were switched back and placed on defendant's tracks for shipment on its road. The manner of making shipments for plaintiffs, and for the Standard Oil Company, was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of Baxter, J., as the better law, and hold that a discrimination in the rate of freights resting exclusively upon such a basis ought not to be sustained. * * *

We think the authorities abundantly show that in a case like the one at bar the plaintiffs can seek relief by injunction, and that it is an appropriate method to determine the rights of the parties here without first resorting to an action at law. The plaintiffs have a manufacturing capacity of 150,000 barrels per year. Shall they be compelled to bring a separate action for each car load? What number of suits would it require? Are the damages of plaintiffs for loss of profits susceptible of easy proof, or even capable of any exact estimation? We think the plaintiffs have a clear and undoubted right to come into a court of equity and have the rights of the parties determined in a single action. * * *

The railroad is an entirety, whether within the state or without, and the artificial person, by the acts of the several states authorizing consolidation, has been created one, and not two or more; and no reason is perceived why it may not be dealt with by the courts of either state that has procured jurisdiction.

This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of plaintiffs in its rates to

points thus reached; but, if it makes rates to points on connecting lines, the rates should be equal to all. The order of the court is that the defendant be restrained, as prayed for in plaintiffs' petition.

Judgment accordingly.

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## HILTON LUMBER CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, 1906. 141 N. C. 171, 53 S. E. 823, 6 L. R. A. [N. S.] 225.)

Plaintiff sued for the recovery of $3,865.26, alleged to have been unlawfully demanded and paid defendant company on account of discriminating overcharges for shipment of logs over defendant's road from the 15th day of November, 1898, to the 30th day of April, 1901. * * * Verdict was rendered upon the issues, and there was judgment for plaintiff. Defendant excepted, and appealed.

CONNOR, J.[2] * * * The cause was heard and determined, as appears from the record, upon the sole question whether during the periods named in the complaint defendant company demanded and received payment from plaintiff a rate of freight in excess of that charged other persons or corporations for the same service under substantially similar conditions. The learned counsel in his brief says: "The action is not in tort, but ex contractu. Plaintiff charges that the defendant required it to pay $2.50 per thousand feet for hauling logs in car load lots a distance of 40 miles when defendant had a regular, established, and published rate for other portions of its line * * * of $2.10 for the same service, and the same rates applied at Wilmington for all who would agree to give the defendant the output of their mills." * * *

The agreement referred to in the complaint is eliminated by plaintiff's averment that it is suing to enforce its right at common law, of which section 3749 of the Revisal of 1905 is but declaratory, to have equality in rates, etc. It will be observed, as said by Clark, C. J., in Lumber Co. v. Railroad Co., 136 N. C. 479, 487, 48 S. E. 813, 816, that this statute is substantially like that portion of the English traffic act known as the "equality clause" and the interstate commerce act. These and similar statutes are said by many of the courts to be but declaratory of the common law, which required all public carriers to serve all persons at reasonable rates and upon equal terms under similar circumstances. However that may be, the fundamental purpose underlying all of this legislation both in England and this country, is, as said by Mr. Justice White, in Railroad Co. v. Interstate Com. Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, that: "Whilst

[2] The statement has been abbreviated, and parts of the opinion have been omitted.

seeking to prevent unjust and unreasonable rates, to secure equality of rates as to all and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of unjust discrimination, to this extent and for these purposes, the statute is remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all." * * *

Defendant operating several lines or branches of railroad in Eastern North Carolina, upon which are located several sawmills deriving their supply of logs over such lines as are convenient to them, maintains a tariff by which it charges mills in Wilmington $2.50 per thousand feet for car load lots a distance of 39 miles and mills at other points $2.10 for the same service, the difference being that it handles the manufactured products of the logs thus shipped at points other than Wilmington and was willing to make the same rates effective to the Wilmington mill on the logs of which it handled the product.

Thus stated, assuming the other conditions to be substantially similar, is the discrimination unlawful? The question is answered by this court in the defendant's appeal at the fall term, 1904, supra. Clark, C. J., says: "The proposition is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff." The authorities are reviewed in the opinion, and we have no disposition to disturb the reasoning or conclusion reached on that appeal. * * *

The real controversy made upon the first appeal, and again presented upon this record, is whether, assuming the facts to be as plaintiff claims, the defendant could give a lower rate to such of its customers as shipped the manufactured product of the logs over its line; and, as we have seen, that question has been decided adversely to the defendant's contention. The only case to which our attention has been directed which would tend to sustain the contention is the L. & N. R. Co. v. Com'n, 108 Ky. 628, 57 S. W. 508, decided by the Supreme Court of Kentucky. We have examined that case with care, and think that the dissenting opinion of Paynter, J., in which two of the other judges concurred and which fully sustains the view taken by this court, and we think supported by authority and reason, is the sound view of the question. The defendant does not controvert the plaintiff's right to recover for money had and received, provided the facts are as alleged. * * *

As said by the Supreme Court of Alabama in Mobile M. R. Co. v. Steiner, 61 Ala. 559, in an action like this: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation and if the shipper pays the rates established in violation of the law to the carrier rather than forego his services, such payment is not voluntary in the legal sense and the shipper may maintain his action for money had and received to recover back the illegal charge." There seems to be no conflict of authorities upon this question. His honor gave judgment for the amount sued for and interest, to which defendant excepted. We think his honor was correct.[3] * * *

[3] In Hoover v. Pa. R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43 (1893), a railroad carried coal for manufacturers cheaper than for retail coal dealers. The court thought the difference justifiable, and said: "In point of fact it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. * * * Another important incident which distinguishes them is that the establishment of manufacturing industries, and the conducting of their business, necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centers of population, resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling."

In State v. Central Vt. Ry. Co., 81 Vt. 463, 71 Atl. 194 (1908), where a statute required railroads to give reasonable and equal terms to all, and gave an action for damages to any person aggrieved by a violation thereof, a declaration was held bad on demurrer which alleged that defendant carried coal for a certain coal dealer at 50 cents a ton less than it charged all others, thereby compelling plaintiff, the state, to buy coal for its asylum of such dealer and at a higher price than it would have paid if able to get transportation at equal rates. The court held the statute to be declaratory of the common law, and said: "The fact that the rates charged in this case were less than those charged to others does not entitle the plaintiff to a judgment; for, as has been shown, the rates charged may have been reasonable and equal within the meaning of the law, though less in amount."

In Menacho v. Ward (C. C.) 27 Fed. 529 (1886), a steamship company was enjoined from advancing its rates to shippers by rival vessels.

In Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 (1894), a company which ran a line of steamers to islands in the Caribbean Sea offered to all who would agree to ship to Barbadoes by it exclusively to give a greatly reduced rate at any time when a certain competing steamer should be loading for that island. It was held that persons unwilling to make the agreement were not entitled to the reduced rate.

## UNITED STATES ex rel. PITCAIRN COAL CO. v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit, 1908. 165 Fed. 113, 91 C. C. A. 147.)

The relator filed in the Circuit Court a petition for mandamus to require defendant railroad company to cease from subjecting relator and other coal companies on its lines to undue and unreasonable discrimination in the shipping and transportation of coal. The petition charged that in its distribution of cars the railroad had subjected relator and other so-called "independent" operators to undue and unreasonable prejudice, and had given other companies undue and unreasonable preference. It particularly alleged that the supply of coal cars was usually insufficient to fill all orders, and that at such times the railroad claimed to distribute available cars as follows: Cars for its own fuel or supply coal it placed as it saw fit; cars sent by other railroads for their fuel or supply coal it placed at the mines to which they were sent; cars belonging to coal companies or operators, called "individual" cars, it placed at the mines of their owners; other cars it divided among the mines, so as to give to each mine an allotted percentage of such cars, which percentage was based upon the quantity of the mine's previous shipments, as well as on its present capacity for shipping, and was not reduced, though individual or railroad fuel cars had also been placed at the mine. Defendant denied the allegations of undue preference and discrimination. The case by consent was tried without a jury. The court held the railroad guilty of undue preference in not charging the individual cars against the percentage allotted to mines which used them, and ordered that mandamus issue requiring such charge to be made, but in all other respects overruling relator's complaint. Each party sued out a writ of error.

PRITCHARD, Circuit Judge.[4] * * * It is sought by this proceeding to secure the enforcement of the provisions contained in section 3 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) and section 1 of the act as amended June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]). The amendment to the latter section is as follows: "It shall be the duty of every carrier subject to the provisions of this act to

In Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643 (1889), an agreement to give a rebate of 15 cents a ton on coal, in consideration of the shipper's undertaking, duly performed, to build a dock and coal pocket on the railroad's premises, a part of which the railroad might use in its general business, was enforced.

In Bundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 39 Am. St. Rep. 589 (1892), an agreement to give to a certain shipper of petroleum, if he would build a pipe line to the place of shipment, a lower rate than that charged to others, was held invalid.

[4] The statement of facts is based on facts stated in the opinion. Parts of the opinion have been omitted.

provide and furnish such transportation upon a reasonable request therefor."

By reference to the body of this section it will be seen that the word "such" refers to the previous sentence of the act, which, among other things, provides that: "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, storage and handling of property transported." * * *

Section 3 of the act provides that: "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." * * *

In passing upon the questions involved, it should be borne in mind that the statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the shipper. The duty thus enjoined cannot be evaded by the carrier by claiming that it is not the owner of a portion of the cars carried over its lines. The duty of furnishing equal facilities relates to and involves purely the question of transportation, and when we are called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated. The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. * * *

If, as in this instance, a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. * * *

It is insisted that the Fairmont Company has large contracts, and therefore it must have a preference in cars by which it might keep its contracts. This contention is untenable. If this condition of affairs could be pleaded in justification of a discrimination in favor of a particular mine owner on the part of the carrier, then the provisions of sections 1 and 3 of the act would be without force, and those mine owners who were favored by the carrier with an unlimited supply of car service would be in a position to go upon the market and solicit business with little or no competition, thereby rendering it impossible for the weaker companies to successfully compete in the open market with their more favored competitors. * * *

At common law the carrier is required to furnish to all shippers, regardless of the question of profit to itself, like facilities without any discrimination, and any contract which does not comply with these principles is void as against public policy. A carrier cannot give a shipper a preference in order that it might profit thereby; neither can it give the shipper a preference in order that the shipper may profit thereby, and, when called upon by the individual shipper for full car service, the only defense which the carrier can interpose in case of failure to comply with the request of the shipper is that the supply which it has furnished is sufficient for normal demands, and that in times of stress it has fairly and impartially prorated all of its car equipment. If it should appear in any such case that any particular shipper was given preference in excess in his pro rata share of its cars, then such preference would necessarily be an "undue preference" at common law. That portion of the interstate commerce act which relates to undue preference is declaratory of the common law, and, when considered in connection therewith, we are forced to the conclusion that any undue preference which is based upon the theory that the preference is made with a view of promoting the interests either of a shipper or a carrier, without due regard to the interests of shippers who are similarly situated, is violative of the sections under which this suit was instituted. * * *

Having disposed of the questions involved in the defendants' writ of error, we will now consider those matters assigned as error by the relator.

The court below, in dealing with the question relative to the fuel cars of the Baltimore & Ohio Railroad Company and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. * * *

It is manifest that it was the purpose of Congress to prevent railroad companies from resorting to such means in order to evade the requirements of the act, to wit, a fair and equal distribution of facilities among shippers similarly situated. In determining as to whether there has been an undue and unreasonable preference in any particular instance, the sole question to be considered is as to whether all the cars hauled over the carrier's lines have been prorated so as to give each and every shipper on its lines his proportionate share of facilities to which he is entitled on the basis agreed upon as the means by which there should be a fair and equal distribution of such car service. Therefore, when we consider the statute, the provisions of which are plain and unmistakable, we are impelled to the conclusion that the arbitrary allotment of the fuel cars of the company and foreign fuel cars is violative of the provisions of the act. Section 1, among other things, provides that: "Cars shall be furnished irrespective of ownership or any contract, express or implied, for the use thereof."

This makes it the duty of the company to furnish cars, regardless of ownership or of any contract, express or implied. Therefore the question as to the ownership of the cars or the purposes for which they are used can have no bearing in this controversy. * * *

In determining the number of cars to which the various companies on the line of the Baltimore & Ohio Railroad Company are entitled, the percentages are based, first, on the capacity of the mine; second, on the previous shipments, the capacity being allowed to count as one and the shipments as two in ascertaining the percentages. The capacity of each mine is ascertained by a personal inspection by the inspector of mines of the Baltimore & Ohio Railroad Company. * * *

In the case of United States ex rel. Kingwood Coal Co. v. W. Va. No. R. R. Co. (C. C.) 125 Fed. 255, Judge Goff, in a very able and exhaustive opinion on this subject, in discussing the proper rule to be observed in working out the most desirable basis for securing a fair distribution of railroad cars to the mine owners, says: "I am of the opinion that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employés, the mine openings, and the miners' houses. No one of these various and essential elements can safely be said to be absolutely controlling, though likely the most important of them all are the real working places, the available points at which coal can be profitably mined. At each true working place a certain quantity of coal, to be

determined by the thickness of the seam and conditions peculiar to the different coal fields, can be excavated and removed during stated periods of time; and so it follows that, if other essentials are adequate, the daily output of a mine can be computed by the number of its available working places."

Under the present method of ascertaining the percentage of cars to which the shipper is entitled, those shippers who are just beginning to develop their property are placed at a great disadvantage, and owing to which it is well-nigh impossible for a shipper thus situated to secure a sufficient allotment of cars as to enable him to dispose of the product of his mine in such quantities to secure anything like a substantial development of his property. Therefore we are of opinion that such system of coal mine rating is unfair and inequitable to new mines located along the line of this railroad company, where there are a number of old and established mines. To hold otherwise would be to give the Fairmont Coal Company and other favored companies an undue and unreasonable preference, which, as we have heretofore stated, is forbidden by the act, and we are therefore of opinion that the court below erred in ruling that this particular method was a fair and reasonable one. We think the true rule as to the basis for the distribution of cars is correctly stated by Judge Goff in the case of United States ex rel. Kingwood Coal Co. v. W. Va. No. R. R. Co., supra, and that, in determining the percentage of cars to which each mine is entitled, the railroad company should be guided solely by the physical capacity of the mine to furnish coal for shipment. * * *

Remanded.[5]

McDOWELL, District Judge, dissents.

[5] "The evidence establishes that poles and materials for the construction, repair, and maintenance of the Western Union lines have been distributed by the cars of plaintiff company between stations, and that this has been going on for years, and still goes on. It also establishes that it has been constantly the practice of defendant company to deliver freight for planters and others between stations, and to receive for transportation, at points between stations, rice, sugar, &c. * * * Relator, it appears, owns its own cars, on which are loaded its telephone and telegraph poles. It applied to defendant company to haul these cars over its lines between New Orleans and Shreveport and throw the poles off, or permit them to be thrown off, at convenient distances. Other railroad companies, operating lines of railway into and out of New Orleans, had done this, and defendant company does the same for the Western Union Telegraph Company, a rival line. It refused the service to relator. That it is the province of the court to say to this common carrier, 'What you do for others you cannot refuse to relator,' cannot, we think, be seriously questioned." Blanchard, J., in State v. Texas & Pac. R. Co., 52 La. Ann. 1850, 28 South. 284 (1900). Acc. State v. Atl. Coast Line, 51 Fla. 578, 40 South. 875 (1906).

See, also, Nichols v. Oregon Short Line R. Co., 24 Utah, 83, 66 Pac. 768, 91 Am. St. Rep. 778 (1901), giving preference to later order for cars; Cent. Stockyards Co. v. L. & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213 (1902), delivering all cattle at yard of one cattle company; State v. C., B. & Q. R. Co., 72 Neb. 542, 101 N. W. 23 (1904), apportionment of cars among grain elevators; Little Rock, etc., Co. v. St. Louis Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192 (1894), waiving prepayment of freight.

## TEXAS & P. RY. CO. v. INTERSTATE COMMERCE COMMISSION.

(Supreme Court of the United States, 1896. 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.)

SHIRAS, J.[a] * * * The complaint in the present case was made by certain corporations of New York, Philadelphia, and San Francisco, known as "boards of trade" or "chambers of commerce," which appear to be composed of merchants and traders in those cities engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago, and merchants in foreign countries who import direct on through bills of lading issued abroad. * * *

After an investigation made by the Commission on a complaint against the Texas & Pacific Railway Company and other companies by the boards of trade above mentioned, the result reached was the order of the Commission made on January 29, 1891, a disregard of which was complained of by the Commission in its bill or petition filed in the Circuit Court of the United States.

The Texas & Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the state of Texas, owns a railroad extending from the city of New Orleans, through the state of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas & Pacific Railway Company has likewise connections with other railroads and steamers forming through freight lines to Memphis, St. Louis, and other points on the Missouri river, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London, and other European ports, to San Francisco and to the other inland points named. It alleged that in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that in fixing said rates it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also, to some extent, by a competition through the Canada route to the Pacific Coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in trans-

[a] The statement of facts and parts of the opinion are omitted.

porting similar merchandise from New Orleans to San Francisco, and so, too, as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific Coast would none of it reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans, nor any merchant or shipper thereof, was injured or made complaint; that the traffic thus secured was remunerative to the railway company, and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The Commission justified its action wholly upon the construction put by it on the act to regulate commerce,[7] as forbidding the Commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro rata share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act, we think the Commission erred. As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act, to justify such a supposition.

So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of

[7] Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154): "Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

a disregard of the act, to take into consideration all the facts of the given case, among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried, and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up, by the terms of this act, to solely regard the complaints of one class of the community.

We think that Congress has here pointed out that in considering questions of this sort the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet nevertheless the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and therefore most likely to have been the construction intended by the lawmaking power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation; and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be "reasonable," that discrimination must not be "unjust," and that preference or advantage to any particular person, firm, corporation, or locality must not be "undue" or "unreasonable," necessarily imply that strict uniformity is not to be enforced, but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act. * * *

The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. Much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

The decree of the Circuit Court of Appeals is reversed. The decree of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill.[8]

FULLER, C. J., and HARLAN and BROWN, JJ., dissent.

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## WIGHT v. UNITED STATES.

(Supreme Court of the United States, 1897. 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258.)

Indictment for violating section 2 of the interstate commerce act (U. S. Comp. St. 1901, p. 3155). Defendant was found guilty. Writ of error.

BREWER, J.[9] * * * It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which, for 15 cents per hundredweight, it would bring the beer from Cincinnati, and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage, by whichever road it was carried. His warehouse was, in a direct line, 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent.

Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting,

[8] In Interstate Commerce Commission v. Louisville & N. R. Co. (C. C.) 118 Fed. 613 (1902), a railroad running from Pensacola to a junction with a railroad to Savannah established rates from points on its line to Savannah disproportionately high as compared with the rates to Pensacola. In consequence goods were sent to Pensacola to market, to the prejudice of Savannah merchants, but to the advantage of Pensacola and of the railroad, which thereby received the entire freight and increased the volume of business at its terminal port. The maintenance of the higher Savannah rates was enjoined.

[9] The statement of facts has been rewritten, and parts of the opinion are omitted.

by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions," within the terms of section 2. We are unable to concur in this view. * * * Counsel * * * say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carrier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true, he formally paid 15 cents, but he received a rebate of 3½ cents; and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier, "directly or indirectly by any special rate, rebate, drawback or other device," to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. * * *

It may be that the phrase, "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is affirmed.[10]

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## INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & N. R. CO.

(Supreme Court of the United States, 1903. 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047.)

This was a proceeding in equity instituted by the Interstate Commerce Commission to enforce their order sustaining a complaint by a merchant of La Grange, a city between New Orleans and Atlanta,

[10] A railroad company, which buys coal, and carries and sells it at an advance above the purchase price less than its usual charge for carriage, is guilty of unjust discrimination against competing shippers within the interstate commerce act. New York, N. H. & H. R. R. v. Int. Com. Com., 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515 (1906).

The interstate commerce act, as amended June 29, 1906 (34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), prohibits the interstate carriage of commodities owned by the carrying railroad other than timber, timber products, and articles for its own use, as a carrier. For the interpretation and effect of this provision, see U. S. v. Del. & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909).

which charged that the rates established by defendant railroad companies from New Orleans to La Grange, as compared with their lower rates from New Orleans to cities beyond La Grange, unjustly discriminated against La Grange and its merchants, gave undue and unreasonable preference and advantage to merchants in such other cities, yielded greater compensation for transportation for a shorter than for a longer distance over the same line, and were in violation of section 4 and other sections of the act to regulate commerce.[11]

The Circuit Court sustained the order of the Commission. The Circuit Court of Appeals reversed the decree.

WHITE, J.[12] * * * The record convinces us that the appellate court correctly decided that there was no legal foundation for the contention that the third and fourth sections of the act to regulate commerce had been violated. It was and is conceded that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta, and that there was, hence, such a dissimilarity of circumstances and conditions as justified the lesser charge for the carriage of freight from New Orleans to Atlanta, the longer distance point, than was exacted for the haul from New Orleans to La Grange, the shorter distance point.

The sum of the rate to La Grange was arrived at by charging the low rate produced by competition at Atlanta, and adding thereto the sum of the local rate back from Atlanta to La Grange. The same rule was applied to the stations between La Grange and Atlanta, each of those stations receiving, therefore, a somewhat lower rate than La Grange, although they were located a greater distance from New Orleans and nearer Atlanta. * * *

When the situation just stated is comprehended, it results that the complaint in effect was that a method of rate making had been resorted to which gave to the places referred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New

[11] Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act. U. S. Comp. St. 1901, p. 3155.

[12] The statement of facts has been rewritten, and parts of the opinion are omitted.

Orleans to the noncompetitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of. It having been established that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by the fourth section of the act, we think it inevitably followed that the railway companies had a right to take the lower rate prevailing at Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask, in addition to the low competitive rate, the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at La Grange obtained at the longer distance places lying between La Grange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. * * *

Affirmed.[18]

[18] The Act of Congress, approved June 18, 1910, beside making unimportant changes in the phrasing of section 4 of the interstate commerce act, amended the section by striking out the words "under substantially similar circumstances and conditions," and by adding the following: "Provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission. Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

In. Int. Com. Com. v. Chicago Gt. Western Ry., 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705 (1908), it appeared that, as a result of competition to secure the carriage to Chicago of dressed beef from packing houses in Kansas City and St. Paul, the rate on dressed meat had been reduced below the rate for live stock. Shippers of live stock and Chicago packers complained of the higher rate on live stock as unjustly discriminating against them. It was found that the rate on live stock was not of itself unreasonably high, and that the lower rate on dressed meat had not caused a diminution in shipments of live stock. Brewer, J., said: "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in Int. Com. Com. v. Ala. Mid. R. R. Co., 168 U. S. 144, 172, 18 Sup. Ct. 45, 42 L. Ed. 414, quoting from the opinion of Circuit Judge Jack-

son, afterwards Mr. Justice Jackson of this court, in Int. Com. Com. v. B. & O. R. R. Co., 43 Fed. 37, 50: 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' * * * It is insisted that 'the making of the live stock rate higher than the product rate is violative of the almost universal rule that the rates on raw material shall not be higher than on the manufactured product.' This may be conceded, but that the rule is not universal the proposition itself recognizes, and the findings of the court give satisfactory reasons for the exception here shown. The cost of carriage, the risk of injury, the larger amount which the companies are called upon to pay out in damages, make sufficient explanation. They do away with the idea that in the relation established between the two kinds of charges any undue or unreasonable preference was intended or secured. * * * An honest and fair motive was the cause of the change in rates; honest and fair on the part of the Great Western in its effort to secure more business, and equally honest and fair on the part of the other railway companies in the effort to retain as much of the business as was possible. In other words, this competition eliminates from the case an intent to do an unlawful act, and leaves for consideration only the question whether the rates as established do work an undue preference or discrimination; and as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, or materially to affect the business of the original complainant, it would seem necessarily to result that the charge of an unlawful discrimination is not proved."

Compare Cin., etc., Ry. v. Int. Com. Com., 206 U. S. 142, 27 Sup. Ct. 648, 51 L. Ed. 995 (1907).

# APPENDIX

## IN THE MATTER OF BILLS OF LADING

**(Before the Interstate Commerce Commission, June 27, 1908. No. 787. 14 I. C. C. Rep. 346.)**

KNAPP, Chairman. This is a proceeding of investigation and inquiry instituted by the Commission on November 21, 1904. Shortly before that date numerous petitions were received from the Illinois Manufacturers' Association and other commercial organizations in Official Classification territory, complaining of the proposed adoption, by railroad companies operating in that territory, of certain changes in the so-called uniform bill of lading then generally used in the transportation of freight over their respective lines.

To inform itself concerning the controversy brought to its attention by these petitions the Commission ordered an investigation, and the first hearing was had on the 5th and 6th days of December, 1904. It appeared at that time that the matters in question were the proper subject for negotiation and settlement between the various conflicting interests, and upon the suggestion of the Commission a joint committee of shippers and carriers was appointed to formulate a suitable bill of lading and report the same to the Commission. During the year 1906 and the first months of 1907 this committee held numerous conferences and gave to the subject most careful attention. On June 14, 1907, they made a report to the Commission, and submitted a bill of lading which appears to have been agreed upon and consented to by the original petitioners and by substantially all carriers in Official Classification territory. The Commission was thereupon asked to approve this bill and direct its adoption.

In order that the matter might be more fully considered and other shippers and carriers have opportunity to be heard before taking action, the Commission on July 8, 1907, made a supplemental order, reciting the proceedings up to that time, providing for a further hearing on the 15th of October following, and requiring carriers to whom it was sent to show cause on that day why the proposed bill of lading should not be approved and prescribed by the Commission to be used on and after January 1, 1908. A copy of the order, with copies of the proposed bill of lading and of the petition of the Illinois Manufacturers' Association (the other petitions being similar thereto), was thereupon mailed to all railroad companies subject to the act to regulate commerce, so far as they were known, and they were directed, if they desired to object to the adoption of this bill of lading, to file their

objections in writing with the Commission on or before the 16th day of September, 1907. * * *

The Commission has been measurably relieved from a task of great difficulty, because the bill as now submitted represents in most, if not in all, of its principal features a virtual agreement between shippers and carriers.

In its general scope as well as its detailed provisions this bill does not differ materially from the one assented to and proposed to the Commission in June, 1907, as above stated. Such changes as have been made, and they are quite numerous, have all been in the direction of greater simplicity and are all believed to be in the interest of the shipping public. Aside from these modifications of the bill as submitted a year ago, another change has been made which is regarded of great practical value. This change consists in the provision of two forms or kinds of bills of lading in place of the single form now and heretofore in use; one to be used for "order consignments" and the other for "straight consignments," as those terms are understood in commercial dealings. These two forms will be distinguished by different colors and each will contain provisions suited to its separate purpose. They will differ only on the face side, the conditions printed on the back being the same in both cases. These differences will appear upon inspection and need not here be enumerated. The main point in this connection is that the "order" bill will possess a certain degree of negotiability, while the "straight" bill will be nonnegotiable and is to be so stamped upon its face. Moreover, and this is a matter of consequence, the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee. It is believed that this plan will in large part meet the requirements of the banking concerns of the country which advance vast sums of money upon bills of lading and are entitled to a reasonable measure of protection.

This proposed bill of lading—for the two forms may be considered as one in what we have further to say—is submitted for adoption by the carriers and use by the shipping public with considerable confidence. It is not claimed to be perfect, and experience may develop the need of further modifications, but it represents the most intelligent and exhaustive efforts of those who undertook its preparation to agree upon a bill of lading which should be reasonably satisfactory to the railroads and the public. It is, of course, more or less a compromise between opposing interests, because on the one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object, and perhaps not without substantial reason. As we are advised, it is in some respects less favorable to the shipper than the local laws or regulations of one or more states, but is more favorable to the shipper than the local laws or regulations of most

of the states. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country. * * *

As above suggested, this bill of lading is designed for use in connection with the movement of miscellaneous freight and general merchandise and as a substitute for the bills now in use in the carriage of this description of property. It is not intended to take the place of special bills of lading which are issued on particular commodities of such a nature or so handled as to require exceptional provisions, such as live stock, for example, and perhaps perishable property. In short, this bill is proposed as a uniform or standard bill, so to speak, to be used in connection with freight articles generally, except such as now are or ought to be carried under special conditions. We are unable from want of knowledge to indicate just what commodities fall within this exception, much less to determine the special provisions suited to any excepted commodity, and therefore do not attempt to go further at this time than to approve of what may be called a standard bill of lading.

Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority. Moreover, the situation makes no demand for a positive direction. The circumstances under which the work of the joint committee has been conducted and the substantial agreement on most points by the different interests concerned, to say nothing of direct assurances from representatives of the carriers, warrant us in expecting that the assenting roads will adopt the bill upon our recommendation. We therefore assume that the railroads in Official Classification territory, whose proposed action was the subject of the original investigation, will adopt and use this bill, to the extent above indicated, from and after the date named for that purpose.

We shall also expect that railroad carriers subject to the act outside of Official Classification territory will adopt and use this bill of lading to the same extent and from and after the same date. There may be peculiar conditions in Western and Southern territory which require some modifications of or additions to this standard bill, but the desirability of uniform usage is so great and the reasons for it so obvious as to justify the expectation that carriers in Western and Southern territory will adopt the bill in question to the fullest extent practicable without abridging any just privileges which their shippers now enjoy.

Accordingly the Commission hereby gives approval to the bill of lading annexed to this report and made a part thereof, the "order" bill and "straight" bill differing only on the front page, the conditions printed on the back being the same in both cases, and recommends its adoption and use, to the extent above named, by all carriers subject to the act to regulate commerce from and after the 1st day of September, 1908. * * *

# FORMS OF BILLS OF LADING

**In use pursuant to the recommendation of the Interstate Commerce Commission**

**Uniform Bill of Lading—Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.**

## The Wabash Railroad Company.

## ORDER BILL OF LADING—ORIGINAL.

**Shippers No.**.....

**Agents No.** .....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

*at* ..... *19*....,

from.....the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

**The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.**

*The Rate of Freight from*.....

*to*.....*is in Cents per 100 Lbs.*

| IF...Times 1st | IF 1st Class | IF 2d Class | IF Rule 25 | IF 3d Class | IF Rule 26 | IF Rule 28 | IF 4th Class | IF 5th Class | IF 6th Class | IF Special per ..... | IF Special per ..... |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |

(Mail Address—Not for purposes of Delivery.)

Consigned to **ORDER OF**.....

Destination,.....State of.....County of.....

Notify.....

At .....State of.....County of.....

Route,.....Car Initial.....Car No.....

| NO. PACKAGES | DESCRIPTION OF ARTICLES AND SPECIAL MARKS | WEIGHT (Subject to Correction) | CLASS OR RATE | CHECK COLUMN |
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If charges are to be prepaid, write or stamp here, "To be Prepaid."

.....

Received $.....
to apply in prepayment of the charges on the property described hereon.

.....
Agent or Cashier.

Per .....

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$.....

.....Shipper. .....Agent.

Per..... Per.....

**(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)**

# ENDORSEMENTS

## CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said prop-

erty has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

**Sec. 3.** No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property so far as this shall not avoid the policies or contracts of insurance.

**Sec. 4.** All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

**Sec. 5.** Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

**Sec. 6.** No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

**Sec. 7.** Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

**Sec. 8.** The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

**Sec. 9.** Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

**Sec. 10.** Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

# The Wabash Railroad Company.

Shippers No..... .....

## STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Agents No. .....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

*at* ..... *19*.....,

from.....the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

*The Rate of Freight from*.....

*to*.....*is in Cents per 100 Lbs.*

| IF...Times 1st | IF 1st Class | IF 2d Class | IF Rule 25 | IF 3d Class | IF Rule 26 | IF Rule 28 | IF 4th Class | IF 5th Class | IF 6th Class | IF Special per ..... | IF Special per..... |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |

(Mail Address—Not for purposes of Delivery.)

Consigned to .....

Destination, .....State of .....County of.....

Route, .....Car Initial.....Car No.....

The rest of the straight bill of lading is like the order bill except that the word "Endorsements" on the back is omitted.

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